Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

DESIGNING HEALTH, INC.,
Petitioner,

v.

UDO ERASMUS, FLORA, INC., FLORA MANUFACTURING AND DISTRIBUTING, LTD., and THOMAS GREITHER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Federal Circuit violate due process, and the seventh amendment right to a jury trial of the jury verdict winner by interpreting its prior decision which upheld liability of the jury verdict winner, without instruction or direction, as one which (after the fact) the Federal Circuit interpreted as unambiguously directing entry of judgment adverse to the jury verdict winner as to both liability and damages?

2. Is it a violation of the seventh amendment for the Federal Circuit to utilize JMOL determination in a non-JMOL context?

3. Did the district court conditionally violate petitioner's seventh amendment right to a jury trial, by finding that even if the district court had discretion to grant a new trial, the district court would not exercise it, in that it was not the trial court that initially tried the case?

PARTIES TO THE PROCEEDING AND DISCLOSURE STATEMENT (RULE 29.6)

PETITIONERS

Petitioners are Designing Health, Inc., ("DHI"), Bernard Collett; and Robert Macintosh Collett. Petitioner DHI is a privately held corporation, with no parent or subsidiary corporations.

Bernard Collett and Robert Macintosh Collett are not corporate parties.

RESPONDENTS

Respondents are Udo Erasmus, Flora, Inc., Flora Manufacturing and Distributing, Ltd., (which DHI believes are privately held corporations), and respondent Thomas Greither.

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OPINIONS BELOW

The February 26, 2007 decision of the Court of Appeals for the Federal Circuit is unpublished, (App. A). The decision of the District Court for the Central District of California is unpublished, (App. C). The judgment of the District Court is App. D.

JURISDICTION

The Federal Circuit ("FC") issued its decision on February 26, 2007 (App. A at 1a). On March 9, 2007, DHI timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which on April 3, 2007, the FC denied (App. B at 14a). DHI filed its Petition for Writ of Certiorari within ninety days of the April 3, 2007 denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sections 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the U.S. Constitution provides:

> "...In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law..."

This appeal also involves Federal Rules of Civil Procedure, Rule 50(b) and (d).

STATEMENT OF THE CASE

The October, 2002 Trial

DHI, an inventor and manufacturer of health food supplement products for animals and humans, sued (face page of complaint, App. T at 318a) a former director Udo Erasmus ("ERASMUS"), and its former exclusive distributors of its human health food products, Flora Inc., ("FL-INC") (US), and Flora Ltd., ("FL-LTD") (Canada), and their president, owner Thomas Greither ("GREITHER") (collectively the "FLORA PARTIES" or "FP") asserting that ERASMUS, while director of DHI, had an undisclosed relationship with the FP, adverse to DHI. In October, 2002, DHI's case proceeded to a jury trial.

On October 30, 2002, the jury found by special verdicts (App. K):

(1) That ERASMUS was liable to DHI for breach of fiduciary duty, awarding DHI $700,000 (App. K at 102a);

(2) That ERASMUS, FL-INC, FL-LTD, and GREITHER were liable to DHI for fraud (App. K at 102a-103a), awarding DHI damages as to ERASMUS of $85,000.00, and awarding DHI damages as to FL-INC, and FL-LTD, of $1,280,000.00 (App. K at 103a);

(3) That by clear and convincing evidence, ERASMUS, FL-INC, FL-LTD, and GREITHER committed fraud "with oppression, malice and fraud," (App. K at 104a); and

(4) That ERASMUS, FL-INC, FL-LTD, and GREITHER conspired to commit fraud (App. K at 112a), rendering the $85,000.00 fraud damage award against

ERASMUS (App. K at 103a) joint and several with GREITHER, FL-INC, and FL-LTD, and rendering the $1,280,000.00 fraud damage award against FL-INC, and FL-LTD (App. K at 103a), joint and several with ERASMUS. By Order of February 13, 2003, the district court determined the effect of the jury's finding of conspiracy (App. L at 122a-123a).

On November 13, 2001, the jury awarded DHI $47,144.00 in punitive damages against ERASMUS (App. M at 128a). By order of February 13, 2003 (App. L at 124a-125a), the district court denied defendants' JMOL motions as to the jury verdicts.

Matters of Introduction of Damages Evidence Before the Trial Court

At the October, 2002 trial, DHI attempted to introduce financial foundation evidence to support damages (checks, sales registers, payments by DHI to former director ERASMUS, made during the time ERASMUS was found to have committed fraud and breached his fiduciary duty) (App. N at 134a-141a, Paras. 15-42). Counsel for ERASMUS and the FP objected to all DHI financial data only on the grounds of relevance (App. N at 134a-141a, 161a-165a, 168a, 170a, 175a-176a). The trial court took the DHI proffer of financial evidence under submission, "sustained will take care of it at the break," (App. N at 161a), without ruling during the presentation of evidence at trial, requesting DHI to identify the basis for the financial evidence. DHI in response presented the basis for admissibility (App. Q at 311a, cover page).

One chart, Ex. 15001 (App. N at 251a-253a) identifies the costs of DHI to "Redesign Labels/ Brochures" as a result of

the respondents' wrongful acts, another chart, Ex. 15002, (App. N at 254a), and Ex. 15003 (App. N at 270a), identifies the amount spent by DHI on the "goodwill of Udo Erasmus," during the time of ERASMUS' unlawful acts, and another chart, Ex. 15004 (App. N at 267a) identifies payments to ERASMUS from DHI during the time he was found to have violated his breach of fiduciary duty.

At trial, DHI attempted to present testimony concerning summary charts based upon accounting data (App. N at 206a), with the trial court not having ruled on the underlying data the evidence was not admissible:

> (Ex. 15001), "We'll have to deal with it later." (App. N at 208a);
>
> (Ex. 15002), "Objection, Mr. Hyman, Please move away from the area that is already at issue and please move on to something else. We will deal with these things and to the foundation of these outside of the presence of the jury. We don't want that to be going on now." (App. N at 211a-212a).

On October 22, 2006, only after the close of evidence, the trial court then rules upon admissibility of DHI summary financial exhibits (October 22, 2002 order, App. N at 131a), never ruling on the underlying financial documents, "The Court orders (among others) the following exhibits admitted: 15000-1, 15000-2, 15000-3, 15000-4."

DHI was then required at closing argument to put on its entire damages case using summary boards (App. P at 305a) (damages as to breach of fiduciary duty, summary of 15001-4), and FL-INC's sales of competing products with identical labels (App. P at 308a-309a). The jury requested to see the

summary boards during deliberation, and the FP, ERASMUS and DHI stipulated the summary boards could be presented to the jury.

The First Appeal, DHI I

The FLORA PARTIES and ERASMUS then appealed to the Federal Circuit (the FC being the appropriate court in that DHI had initially asserted a claim for patent infringement (App. T) which had been dismissed with prejudice prior to trial).

The FP's Brief asserted fraud liability should be reversed (App. U at 321a-322a), in that: "...The Jury's Direct Fraud Damage Award Against The Flora Companies Was Premised On Unsponsored Evidence Admitted After The Close Of Testimony..." (App. U at 323a). ERASMUS asserted that "...Admission and Use (at closing argument of damage summaries) of the 14000 and 15000 Series To Establish Damages Was Improper and Prejudicial." (App. V at 325a).

In DHI's Brief on appeal in DHI I, (App. W at 335a), DHI indicates to the Federal Circuit that DHI attempted to offer foundation accounting evidence to which the FP and ERASMUS objected, delaying admissibility (App. W at 335a-337a) as indicated in DHI I, that DHI created summaries pending admissibility of underlying accounting data (App. W at 337a), with DHI asserting on appeal in DHI I that:

> "...the FP's and UE's could not demonstrate how their continuing objections as to relevance, which caused delay in the Court's ruling on admissibility after the October 7, 2003 presentation of foundation was an abuse of the Court's discretion." (App. W at 337a).

The Federal Circuit Court's June 1, 2005 Decision

The Federal Circuit's June 1, 2005, Decision, DHI I, first held that:

"Between 1992 and 1994, the Colletts developed an animal food supplement product based on flax and other oil seeds. The Colletts formed DH in March of 1994, in order to manufacture and produce the animal supplement, and later, a human version of the supplement. The flax seed product, bearing the name "Udo's Original," was marketed by Udo ERASMUS, an author of books on nutrition. ERASMUS served as a consultant and a director of DH until his resignation in June of 1998." (App. E at 24a).

"...[DH] alleged that ERASMUS, the Flora Companies and Greither represented that 'if Plaintiff DH would terminate its present Canadian distributors, and terminate its distributors which sold DH products to health food stores in the United States, Defendants Flora Inc., and Flora Ltd., would on a best efforts basis, promote, exclusively distribute and sell Plaintiff DH's products in Canada and exclusively in the US to health food stores." (App. E at 25a).

DH also alleged that:

"ERASMUS, the Flora Companies and Greither represented that if Plaintiff DH would agree to cease using it present packaging design (used by Plaintiff DH from November, 1993 into 1996) which included the designation Udo's Original and at times a picture of Defendant ERASMUS and would agree to use the designation Udo's Choice on DH products, Flora Inc.

and Flora Ltd. on an exclusive best-efforts basis would place DH's products in four thousand (4000) health food stores which carried Flora Ltd. and Flora Inc. products in Canada and the United States." (App. E at 25a).

"Plaintiffs assert that as a result of defendants' representations DH entered into distribution agreements with the Flora Companies." (App. E at 25a).

"...According to the complaint, however, defendants' real intent was: '(1) to have Plaintiff DH relinquish its independent goodwill in the trade designation 'Udo's Original' in which DH had expended considerable expense and resource to develop in the marketplace, and (2) to have DH limit, in 1996 and 1997, its independent marketing and promotion of DH's products, and (3) to have DH limit its development of its independent goodwill and sales, while Defendants secretly undertook to develop products competitive to DH, which Defendants would then pass off as DH's products, using the same formula, trade dress and labels of DH, claiming to retail customers that DH was either 'out of business, 'or that the Defendants' products 'were in fact the replacement products for DH products.' Fifth Amended and Supplemental Complaint at 12..." (App. E at 25a-26a).

The FC's Decision in DH I also identified the DHI allegations for breach of fiduciary duty against ERASMUS:

"While director of DH, ERASMUS entered into agreements with the Flora Companies under which he created, marketed and developed products that directly

competed with the products of DH. Plaintiff also alleged that while a director of DH, ERASMUS disclosed proprietary confidential information to the Flora Companies and induced DH to invest considerable sums in advertising and promoting ERASMUS' likeness in association with DH'S food supplement products. At the same time, plaintiffs asserted ERASMUS entered into an agreement with Greither that provided that Greither and ERASMUS would jointly own all rights in ERASMUS' name and likeness in marketing food supplement products." (App. E at 26a).

In DHI I, the FC, while upholding the jury's finding of liability as to fraud and conspiracy to commit fraud, found as to DHI's fraud damages that:

"Under California law, in cases involving fraud where property is not exchanged, damages under section 3333 are limited to the "actual losses suffered because of the misrepresentation," regardless of whether a fiduciary relationship existed between the parties." (App. E at 33a).

The Appellate Court found:

"The testimony of Mr. Collett concerning the terminated distributors is insufficient for a number of reasons ... the testimony fails to establish that DH terminated the distributors in reliance on the distribution agreements. Most importantly, it fails to establish the profits, if any, that DH derived from sales to the terminated distributors. The evidence of DH's gross sales figures for pet products and for human products in the years prior to entering into the

distributorship agreements is also insufficient to establish damages. In addition, DH offered no lay or expert testimony to establish prospective sales." (App. E at 33a) (emphasis added).

The Federal Circuit Court also found that in attempting to establish lost sales resulting from fraud and conspiracy to commit fraud that:

"Merely pointing to past sales is not enough, especially given the fact that DH had only recently entered into the market for sales of its product for humans." (App. E at 33a).

"...Because the record evidence does not sufficiently support the jury's fraud damages award against defendants, the district court's denial of JMOL as to the fraud damages award is reversed..." (App. E at 34a).

The FC's Decision also found that while upholding the jury's verdict as to breach of fiduciary duty liability against ERASMUS, that with regard to damages:

"The evidence presented by DH is insufficient as a matter of law to support the breach of fiduciary duty damages award. First, even if the entire 15000 Series had been properly admitted by the district court, the fact still remains that DH failed to present any evidence, in the form of lay or expert testimony, as to why all of the costs of promoting DH's health supplement products in connection with ERASMUS constitute economic losses resulting from ERASMUS' breach of fiduciary duty. Second, DH failed to present any evidence to explain why payments made

to ERASMUS as a director and manager of DH constitute economic losses resulting from ERASMUS' breach of fiduciary duty." (App. E at 36a) (emphasis added).

"...Because the record evidence does not sufficiently support the jury's breach of fiduciary duty damages award against Erasmus, the district court's denial of JMOL as to the damages award is reversed..." (App. E at 36a).

The FC's Decision in DH I concluded as to the damages award:

"For the foregoing reasons, we reverse the damages awards against ERASMUS and the Flora Companies for fraud in the amount of $132,144 and $1,280,000, respectively, as well as the damages award against ERASMUS for breach of fiduciary duty in the amount of $747,144." (App. E at 37a).

In the next sentence of its decision, the FC held as well:

"We have carefully considered, but have not found persuasive, all other arguments made by the parties regarding the remaining aspects of the district court's final decision. Thus, this court affirms: (1) the district court's denial of JMOL with respect to the jury's verdict of liability against ERASMUS and the Flora Companies for fraud and conspiracy to commit fraud, and against Erasmus for breach of fiduciary duty." (App. E at 37a).

In its June 1, 2005 decision (App. E), the FC concludes:

"...For the foregoing reasons, the decision of the district court is affirmed-in-part and reversed-in-part..." (App. E at 37a).

The Federal Circuit's June 1, 2005 decision (App. E at 37a) provided no "instruction" or "direction." The August 16, 2005 Federal Circuit Judgment (App. F at 39a) states:

"...This cause having been heard and considered, it is ORDERED and ADJUDGED affirmed in part and reversed in part..."

DHI's Petition for Rehearing

DHI's June 27, 2005 petition for rehearing (App. G) sought:

"...clarification by the FC to provide limited direction to the district court, that the case is remanded for a new trial on damages and punitive damages at the district court's discretion in accordance with Federal Rules of Civil Procedure Rule 50(d)" (App. G at 43a).

DHI stated it:

"...first wishes to avoid interpretive conflict as to the mandate, and therefore seek clarification." (App. G at 43a).

DHI's PFR (App. G at 45a) identifies Weisgram v. Marley Company, 528 U.S. 440, 120 S.Ct. 1011, 145 L.E.2d 958, referring to the three Weisgram alternatives, indicating that the:

"...DHP concede that this Court's apparent disinclination to select one of the three (3) alternative directions identified in Weisgram, supra is consistent in this Court's DECISION upholding the district court's finding of liability and reversing only as to damages." (App. G at 45a-46a).

DHI indicates:

"...Having searched, the DHP have not found an appellate authority which applied Weisgram, supra to the circumstance of when liability was upheld and damages alone were reversed...." (App. G, FN 3 at 46a).

DHI's PFR asserted that: "...The DHP interpret this Court's DECISION as providing a remand to the district court for a determination for a retrial of the issues of damages and punitive damages as to the Flora Parties and Erasmus, leaving for the district court to determine the nature of a re-trial, as provided by Federal Rules of Civil Procedure, Rule 50 (d)." (App. G at 46a).

DHI's PFR referenced the authorities relied upon in the FC June 1, 2005 decision as to damages, Christiansen v. Roddy, 186 Cal.App.3d 780, 231 Cal.Rptr. 72 (Fifth District, 1986) (App. E at 32a), for the holding that a fraud claimant is "...barred from recovering benefit-of-the-bargain damages." In Christiansen, supra, the California Courts of Appeal reversed the trial court's allowance of benefit-of-the-bargain damages, and:

"...remand(ed) to the trial court for reconsideration of damages consistent with the discussion of interest

herein. In all other respects the judgment is affirmed. Id. at 791 (emphasis added) (App. G at 48a).

DHI also indicated (App. G at 49a), the FC's Decision (App. E at 32a) relies upon Kenly v. Ukegawa, 16 Cal.App.4th 49, 10 Cal.Rptr.2d 771, 774 (Fourth Dist. 1993), where the California Courts of Appeal reversed only as to damages and ordered:

> "The damage award against (defendants) **is reversed for retrial solely on the issues of the** proper amount of compensatory and punitive damages...." Kenly, supra, at 58 (App. G at 49a) (emphasis added).

DHI's PFR (App. G) indicated that the Federal Circuit in DHI I found inadmissibility of summary evidence as the basis for reversing the district court's denial of the JMOL as to breach of fiduciary duty damages as to ERASMUS, twice relying on Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1259 (9th Cir. 1984), (App. E at 35a), where the Ninth Circuit in reversing the damage award based upon inadmissible summaries, held:

> "We therefore reverse and remand this case for a redetermination of the existence and scope of the Employer's liability in light of a proper understanding of the applicable Federal Rules of Evidence. Paddack, supra, at 1263 (emphasis added) (App. G at 50a).

FP's Opposition

The FP opposition to the DHI Petition argued in part that Judgment should be entered for defendants (App. H at 68a), and that "...A partial retrial solely as to damages would be improper...," requesting a retrial on liability and damages

(App. H at 74a). The FP asserted that DHI is required to assert additional grounds for a new trial (identifying the grounds to be asserted for improper jury instructions), and cites to Weisgram, supra, for the proposition that "...the appellate court may appropriately instruct the district court to enter judgment against the jury-verdict winner." (App. H at 67a).

ERASMUS' opposition indicates as to the state of the record that: "...Hence, up to the time of its June 1, 2005 decision (the "Decision"), this Court lacked any access to the motion papers respecting defendants motions for JMOL..." (App. I at 86a).

On August 3, 2005, the FC denied the DHI petition and the FP implicit counter petition for a direction of judgment, without comment (App. J).

Proceedings At the Trial Court After DHI I

After appeal, DHI, as the liability verdict winner on appeal, moved the district court for a new trial on damages and punitive damages,[1] and the FP and ERASMUS then move the district court for entry of judgment as to both liability and damages for the verdict losers.

By order of November 17, 2005 (App. C at 17a), the district court held:

> "...The order of the Circuit Court is clear on its face in compelling reversal of the denial of the JMOLS.

---

[1] Unknown to any party, pending appeal, the initial trial judge, the Honorable Lourdes Baird, had resigned from the bench.

> However, Plaintiffs have argued they are entitled to a new trial because evidence that might have supported the damages award was allegedly improperly excluded at trial. This is an issue that should have been raised on appeal, either in the briefing or in the Petition for Rehearing. See *Weisgram v. Marley Co.*, 528 U.S. 440, 454-455 and n. 11 (2000); *Neely v. Martin K. Eby Const. Co.*, 386 U.S. 317, 329 (1967)...."

The District Court also found that even if the District Court had discretion it would not exercise it in that as stated, the trial court post-appeal was not the court that tried the case (App. X, November 14, 2005 transcript of proceedings):

> "...The cases say that part of the reason that a circuit court might want to send it back is, of course, that the trial judge has had experience with the case. The trial judge here is no longer here. I don't have any more experience with this case than the federal circuit did. Therefore, there's no reason for me - - any more reason for me to interpose my discretion than there would have been for the federal circuit..." (App. X at 340a-341a).

On January 24, 2006, the District Court entered judgment on liability and damages in favor of the verdict losers (App. D).

The Second DHI Appeal

DHI then appealed the entry of judgment against it.

The Federal Circuit February 26, 2007 decision in DHI II (App. A) finds:

"Because the district court properly executed our mandate of August 10, 2005 , we affirm." (App. A at 13a).

The FC Decision (App. A) characterizes DHI's argument:

"...DH argues on appeal that the district court erred in finding that the Federal Circuit's decision mandated entry of JMOL in favor of both Flora and Erasmus on damages, and thus precluded a new trial on damages. DH urges that *Weisgram v. Marley Co.*, 528 U.S. 440, 120 S. Ct. 1011, 145 L.Ed.2d 958 (2000), implies a notice requirement whereby a court of appeals must be explicit when it directs a district court to enter judgment for the jury verdict loser in order to put the jury verdict winner on notice that it must seek a new trial before the court of appeals. According to DH, absent this explicit notice, a court of appeals' silence in the mandate should not be construed by the district court as requiring entry of judgment for the jury verdict loser. Rather, the jury verdict winner should be free to seek, and the district court should have the discretion to grant, a new trial on remand. DH further argues that the district court's denial of a new trial on damages was inconsistent with DH's Seventh Amendment right to jury trial. DH further outlines several alleged evidentiary failings by the district court which DH asserts support allowing a new trial on damages..." (App. A at 5a-6a).

The FC in DHI II finds that:

"...Given that it was permissible for this court in DH I to direct entry of judgment below in favor of Flora

and Erasmus, we must determine if that is in fact what our mandate did." (App. A at 9a).

The Federal Circuit Court based its decision in part upon the following:

1. "...This Court's mandate in DH I left the district court with no additional issues to dispose of, and the only thing left for the district court to do was to grant JMOL in favor of Flora and Erasmus with respect to damages..." (App. A at 10a).

2. "...We see nothing in Weisgram that implies a 'notice due process requirement.' Furthermore, the text of Federal Rule of Civil Procedure 50(d) alone is adequate to put any plaintiff-appellee on notice of the proper procedure to follow when a district court's denial of JMOL is overturned on appeal..." (App. A at 11a).

ARGUMENT

The Circuit Court Abused Its Discretion In Interpreting Its Prior Mandate

The Federal Circuit in DHI II (App. A) in interpreting its prior decision in DHI I (App. E) which specifically upheld liability and reversed only as to damages with no direction, as one (after the fact) to be interpreted to have implicitly directed entry of judgment as to liability is an abuse of discretion.

Justice Ginsberg in Weisgram, supra acknowledges that it is difficult for the verdict winner on appeal in those cases in where evidence admitted at trial is excluded on appeal as a

basis of JMOL as to liability to argue for a new trial on appeal:

> "...We recognize that it is awkward for an appellee, who is wholeheartedly urging the correctness of the verdict, to point out, in the alternative grounds for a new trial." Weisgram, supra at 455, FN 11.

Justice Ginsberg references:

> "Louis, Post Verdict Rulings on the Sufficiency of The Evidence ... It is often difficult to argue that a gap in one's proof can be filled before a court has held that the gap exists..." Weisgram, supra at 455, FN 11.

And Justice Ginsberg holds in Weisgram, supra at 455:

> "...And if judgment is instructed for the verdict loser, both will have a further chance to urge a new trial in a rehearing petition." Weisgram, supra at 455 (emphasis added).

The abuse of discretion of the Federal Circuit in DHI II, reflects the Federal Circuit's inconsistent use of the JMOL characterization as to what are in fact properly characterized as "straight reversal" decisions. Petitioners have located only two split JMOL decisions by an appellate court both by the Federal Circuit.

In Integra Lifesciences I, Ltd., v. Merck, 331 F.3d 860 (Fed Cir., 2003), the FC Circuit held, in part:

> "Nonetheless, the record evidence does not adequately support the jury's damage award of $15,000,000 in this case. Therefore, the district court's denial of

> JMOL as to the damage award is reversed. This case is remanded for further factual development and the calculation of damages consistent with the principles discussed herein." Id. at 872 (emphasis added).

In Riels v. Shell Exploration and Production Company, 298 F.3d 1302 (Fed Cir., 2002), the FC reversed the denial of a JMOL as to damages, and affirmed the district court's denial of the JMOL as to liability, finding that "there was no model" (substantial evidence) to support the damage award, and therefore, "...remands the case to the district court for a redetermination of the damage award." Id. at 1314.

Weisgram, supra and Neely v. Martin K. Eby Construction, 386 U.S. 317, 87 S.Ct. 1072 (1967) without question support the authority of the Court of Appeals to "direct" or "instruct" judgment for the verdict loser, when there is either an absence of evidence, or evidence is excluded on appeal though admitted at trial, with the application of JMOL (formerly JNOV) procedure for those small percentage of cases in which the Appeals Court finds that there is no likelihood that the plaintiff could or would be able to prove liability.

In DHI II, DHI contended that it could locate no authority in which there had been a split JMOL upholding liability and reversal as to damages, in which the Court of Appeals specifically directed enter of judgment below.

Liability was specifically upheld in DHI I, and in DHI I "...judgment (was not) instructed for the verdict loser..." Weisgram, supra at 455.

And though Hertzel v. Prince William County, Virginia 523 U.S. 208, 118 S.Ct. 1210 addressed the issue of

remittitur, not applicable here, the language is reflective of Seventh Amendment rights in Hertzel, supra at 211, "...Neely v. Martin K. Eby ... did not involve overturning an award of damages where the evidence was found sufficient to support a finding of liability." Hertzel, supra at 211.

The Federal Circuit's DH II February 26, 2007 Opinion identifies its authority to "...order dismissal or direct entry of judgment." (App. A at 9a) (emphasis added).

Justice White in Neely, supra utilizes the identical mandated language:

(1) "...with instructions to dismiss the action." Neely, supra at 320 (emphasis added);

(2) "...if the court of appeals has directed entry of judgment for appellant-the court of appeals may make a final disposition of the issues presented..." Neely, supra at 329 (emphasis added).

And in Weisgram, supra, Justice Ginsberg also held as to the opportunity to seek a new trial on a petition for rehearing occurs "when judgment is instructed" that:

"...And if judgment is instructed for the verdict loser, both will have a further chance to argue a new trial in a rehearing petition...." Id. at 445 (emphasis added).

The 1965 Tenth Circuit's decision of Martin v. Neely, 344 F.2d 482 (10th Cir., 1965), reversing the district court's denial of a JMOL as to liability held:

"...We conclude that the record wholly fails to disclose sufficient evidence to establish negligence or

assuming such negligence that it was the proximate cause of Neely's death..." Id. at 486 (emphasis added), (concluding with the sentence):

"Reversed, with instructions to dismiss the action." (emphasis added) Id. at 486.

The 1998, Eighth Circuit decision of Weisgram v. Marley, 169 F.3d 514 (8th Cir., 1998), reversing the district court's denial of a JMOL as to liability held:

"...Bonnie Weisgram's death in this fire was a tragedy and the damage to the town houses was unfortunate. But if the heater cannot be proven to have been defective when Marley sold it, then under North Dakota law of strict products liability the plaintiffs cannot prevail-even assuming Freeman and Dolwence are correct about the gassing effect and the rest of their theory relating to the cause of the fire." Id. at 522.

The Eighth Circuit then held:

"The judgment for the plaintiffs is vacated and the case is remanded to the District Court with instructions to grant Marley judgment as a matter of law." (emphasis added) Id. at 522.

The Federal Circuit "jumps" from Neely, supra, and Weisgram, supra, where a court of appeals: (1) reverses a trial court's denial of JMOL as to liability, "no proximate cause," Neely, supra at 486, "not a close case," Weisgram, supra at 522; (2) which court of appeals specifically directs enter of judgment for the verdict loser, "with instructions to grant Marley judgment as a matter of law," Weisgram, supra

at 522, to the present case as impliedly requiring direction of judgment on liability where: (1) the Federal Circuit specifically upholds liability found by clear and convincing evidence, (2) where the court of appeals provides no "instruction" whatsoever, (3) when the very authorities relied upon by the Federal Circuit as to JMOL as to damages are all "straight reversal" authorities which direct a new trial on damages, and (4) which decision (DHI I) the FC does not even address all of the damages elements presented as to Breach of Fiduciary duty damages indicating proof was lacking.

The Federal Circuit in DHI II (App. A at 11a) held:

> "...We see nothing in Weisgram that implies a 'notice due process requirement.' Furthermore, the text of Federal Rules of Civil Procedure 50 (d) alone is adequate to put any plaintiff-appellee on notice of the proper procedure to follow when a district court's denial of JMOL is overturned on appeal." (emphasis added).

DHI contends that Federal Rules of Civil Procedure Rule 50 (d) is "not adequate" to put any plaintiff-appellee on notice of the proper procedure to follow when a district court's denial of a JMOL as to liability is upheld on appeal, and where the Appellate Court utilizes the language of "JMOL" as to damages relying upon authorities that indicate a new trial on damages is required, and in which decision the Appellate Court indicates that the verdict winner on liability has not indicated "...why all costs of promoting...constitute economic losses...resulting from breach of fiduciary duty...," (App. E at 36a), and provided no instruction nor direction.

DHI acknowledges the lack of direct request for a new trial in its Petition for Rehearing in DHI I, (App. G), and the assertion that its Petition for Rehearing in DHI I was its opportunity to so assert. Yet with the Federal Circuit upholding liability with no direction of "entry of judgment," DHI confronts a "no win" circumstance. If, in DHI I, DHI assumes that affirmance of liability without direction is in fact intended to be direction for entry of judgment and seeks a new trial presenting its basis to do so, DHI concedes an interpretation that DHI finds without basis, and DHI confronts the issue of judicial estoppel. If DHI requests clarification, which DHI did, and if there is clarification indicating direction of an adverse judgment below, DHI then would proceed to present its argument for a new trial.

The Issue Is Important

The issue is important given the Federal Circuit's prevalent use of the JMOL terminology to non-JMOL circumstances. As well in that the Federal Circuit in non-patent cases is required to follow the law of the circuit in which the case arose, the Federal Circuit engrafts into Ninth Circuit jurisprudence split JMOL as to liability and damages, which the Ninth Circuit does not utilize, with the Ninth Circuit utilizing JMOL only as to liability.

The issue is important in that an Appellate Court's termination of a jury verdict winner on appeal, should not be derived through implicit convoluted interpretation after the fact, which did not address termination of a jury verdict winner claims, where liability was upheld.

The Federal Circuit's citation to Tronzo, 236 F.3d 1348 and Engel Insurance, 156 F.3d at 1382 (App. A at 10a), provide no support for the Federal Circuit's assertion that the

Federal Circuit can terminate a jury verdict winner's liability verdict through an implicit holding without notice.

The Judicial Process In This Matter Belies The Federal Circuit's Holding

If the Federal Circuit, as Justice While identified, "instruct(s) to dismiss the action," Neely, supra at 320 and/or utilizes the language "if the court of appeals has directed entry of judgment for appellant..." Neely, supra at 329, there is nothing for the district court to interpret, and nothing for the Court of Appeals to have decided in a subsequent appeal.

The district court after DHI I was called upon to determine the effect of the DHI I decision (App. C), and entered a judgment (App. D). Yet if there was an "instruction to dismiss the action," Neely, supra at 320 or a "...directed entry of judgment for appellant...," there would be no requirement for motions and a determination below and a subsequent interpretation of what was initially intended.

DHI contends that when the Supreme Court in Neely, supra, and Weisgram, supra, utilized the words "instruction to dismiss..." and "...direct entry of judgment below....," the purpose of the two decisions not only indicated the authority of the court of appeals, but in service of the Seventh Amendment, required a minimum of notice to the verdict winner of what the Court of Appeal explicitly intended, not requiring the verdict winner on liability on appeal to have to "surmise" and "suppose," and attempt to determine what course to take. Due process is not served under these circumstances.

The DHI II Decision Omits Important Statements In DHI I

The DHI II Decision omits telling reference to the DHI I Decision as to breach of fiduciary duty damages.

The DHI I Decision (App. E at 36a) in fact states:

> "First, even if the entire 15000 Series had bene properly admitted by the district court, the fact still remains that DH failed to present any evidence , in the form of lay or expert testimony, as to why all of the costs of promoting DH's health supplement products in connection with Erasmus constitute economic losses resulting from Erasmus's breach of fiduciary duty." (App. E at 36a) (emphasis added).

DHI emphasizes the phrase "...why all of the costs of promoting...."

The DHI I Decision also indicated:

> "...DHI failed to present any evidence to explain why payments made to ERASMUS as a director and manager of DHI constituted economic losses resulting from ERASMUS' breach of fiduciary duty...." (App. E at 36a).

There were however other elements of the 15000 series:

Exhibit 15001 (App. N at 251a) indicates $42,932.16, which DHI identified as the costs to redesign the DHI labels, resulting from ERASMUS' secret agreement to use his name and likeness to sponsor identical products with the FP, causing DHI to have to redesign its labels.

As to the payments to ERASMUS from DHI while ERASMUS was committing fraud and breaching his fiduciary duty (App. N at 254a), the FC in DHI I did not indicate that none of the amounts paid to ERASMUS were barred as damages as a matter of law.

As to the fraud damages, the FC in DHI I did not indicate that DHI would be unable to establish reliance or out of pocket damages. And in fact, 15001 costs to redesign labels as a result of the fraud was in fact out of pocket damages.

DHI suggests a due process element enunciated by Justice Ginsberg in Weisgram, supra:

> "And if judgment is instructed for the verdict loser, both will have a further chance to urge a new trial in a rehearing petition." Weisgram, supra at 454-455 (emphasis added).

DHI contends that the balance as to the procedural notice requirements of Rule 50(d) is that of: "..directed entry," or "...instructions to dismiss...," Neely, supra, Weisgram, supra.

DHI respectfully suggests that the Federal Circuit's holding as to its own interpretation was a violation of due process and was inconsistent with DHI's Seventh Amendment right to a jury trial.

The Federal Circuit's Use Of JMOL Characterization In Non-JMOL Contexts Is A Violation Of the Seventh Amendment

The Federal Circuit's jurisprudence does not distinguish a JMOL reversal as to damages as opposed to a straight

reversal as to damages. All authorities relied upon by the Circuit Court as to damages in DH I were "straight reversals," with the Federal Circuit's adopting JMOL language.

The Federal Circuit has no established criteria which distinguishes between the split JMOL reversals and straight reversals as to damages.

In Integra Lifesciences I Ltd. v. Merck, 331 F.3d 860, 872, a reversal of JMOL as to damages, the Federal Circuit remands for "calculation of damages." In Riels v. Shell Exploration, 298 F.3d 1302, 1314, a Federal Circuit reversal JMOL as to damages, also remands for redetermination of damages. The only two authorities with split JMOL as to damages found in the Federal Circuit.

That lack of Federal Circuit's lack of standard as to the use of JMOL as to damages operates as a denial of notice and due process to DHI.

The District Court Conditionally Violated DHI's Seventh Amendment Right To A Jury Trial

The district court indicated in that even if it had discretion it would not grant a new trial in that it was not the initial trial court (App. X at 340a-341a) is inconsistent with fundamental principles enunciated in Weisgram, supra and Neely, supra.

In Weisgram, supra, Justice Ginsberg cites to Neely:

> "...Part of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed

> upon by the district court, rather than the court of appeals, because of the trial judge's first-hand knowledge of witnesses, testimony, and issues - because of his 'feel for the overall case.' These are valid concerns to which the court of appeals should be constantly alert. 386 U.S. at 325, 87 S. Ct. 1072..." Weisgram, supra at 451.

Yet if in the interim of the appeal, the district judge resigns, is elevated, goes on senior status and refuses the case, or becomes infirm, the case upon remand is not provided to the "...trial judge ... who has firsthand knowledge of the case..." Neely, supra at 325.

The district court in DHI in essence creates two classes of verdict winners, those whose initial trial judge remains available to resolve the case after appeal, and those who are not. For those, whose judges have departed (for whatever reason), they do not obtain the benefit of considerations of a new trial, unless the court of appeals directly orders it.

Again it is the Federal Circuit's improper use of JMOL to non-JMOL circumstances that creates a conundrum for the district court, and creates two classes of jury verdict winners.

CONCLUSION

The Federal Circuit decision is contrary to the decisions of Weisgram v. Marley, 528 U.S. 440, 456 (2000) and Neely v. Martin K. Eby Construction, 386 U.S. 317 (1967).

The Federal Circuit abused its discretion in the interpretation of its prior decision which affirmed liability without direction or instruction thereafter interpreting its prior decision as directing entry of judgment below on liability.

There cannot be a split JMOL, which is an invention of the Federal Circuit's misuse of JMOL terminology to non-JMOL circumstances, resulting in denial of Seventh Amendment rights and due process.

Respectfully submitted,
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DATED: July 2, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2006-1244

[February 26, 2007]

DESIGNING HEALTH, INC.,
Plaintiff-Appellant,

and

BERNARD COLLETT and
ROBERT MACINTOSH COLLETT,
Plaintiffs/Third Party Defendants-Appellants,

and

COLLETT VETERINARY CLINIC, INC. and
COLLETT FAMILY TRUST,
Third Party Defendants,

v.

UDO ERASMUS,
Defendant/Third Party Plaintiff-Appellee,

and)
)
FLORA, INC., FLORA MANUFACTURING)
AND DISTRIBUTING, LTD.,)
)
THOMAS GREITHER and)
GABRIEL LIGHTFRIEND,)
Defendants-Appellees.)
)

OPINION

SCHALL, *Circuit Judge*.

DECISION

Designing Health, Inc.; Robert M. Collett; and Bernard Collett, (collectively "DH") appeal from the final judgment of the United States District Court for the Central District of California granting judgment pursuant to the Federal Circuit's mandate of August 10, 2005. *Designing Health, Inc. v. Erasmus*, No. CV 98-4755 (C.D. Cal Jan. 23, 2006) ("Final Judgment"). DH argues on appeal that the district court erred in finding that the Federal Circuit's decision 1) mandated entry of judgment as a matter of law ("JMOL") in favor of both Flora Inc., Flora Manufacturing and Distributing, Ltd. (collectively "Flora") and Udo Erasmus ("Erasmus"), and 2) precluded a new trial. Additionally, DH argues that the district court erred in declining to exercise its discretion to grant a new trial in the event the Federal Circuit's decision did not mandate entry of JMOL in favor of Flora and Erasmus and did not preclude a new trial. Flora and Erasmus counter that the district court properly concluded that the Federal Circuit mandate of August 10, 2005, compelled entry of JMOL in favor of Flora and Erasmus and that it had no

discretion to grant a new trial. Because the district court properly executed our mandate of August 10, 2005, we affirm.

DISCUSSION

I.

DH, a manufacturer of health food supplements, previously brought suit against Flora and Erasmus in the Central District of California alleging conspiracy to commit fraud, breach of fiduciary duty, and patent infringement. The district court dismissed the patent infringement claims, denied Flora's and Erasmus' motions for judgment as a matter of law, and entered judgment, upon a jury verdict, in favor of DH on the fraud and breach of fiduciary duty claims. Erasmus and Flora appealed the decision of the district court denying their motion for JMOL regarding (1) the jury verdict that they were liable for fraud; (2) the jury's award of damages resulting from that fraud; and (3) the jury's verdict that they were liable for conspiracy to commit fraud. Erasmus appealed the decision of the district court denying his motion for JMOL regarding (1) the jury's verdict that he was liable for breach of fiduciary duty; and (2) the jury's award of damages for that breach.

On June 1, 2005, this court issued a decision on the prior appeal. *Designing Health, Inc. v. Erasmus*, 132 Fed. Appx. 826 (Fed. Cir. 2005) (unpublished decision) ("DHI"). This court affirmed the district court's denial of JMOL with respect to the jury's liability verdicts against Flora and Erasmus but reversed the district court's denial of JMOL as to damages against both Flora and Erasmus, holding that the record evidence was insufficient as a matter of law to support

the jury's fraud and breach of fiduciary duty damages awards. *Id.* at 833-34.

On June 27, 2005, DH filed a petition for rehearing requesting "clarification by the Court to provide limited direction to the district court, that the case is remanded for a new trial on damages and punitive damages at the district court's discretion in accordance with Federal Rule of Civil Procedure Rule 50(d)." The petition for rehearing was denied without comment on August 3, 2005.

II.

After this court's mandate in *DH I* issued on August 10, 2005, the district court granted Flora and Erasmus' renewed motions for JMOL, stating:

> Pursuant to the Federal Circuit's June 1, 2005 opinion and August 10, 2005 mandate ordering reversal of this court's order denying Defendants' motions for judgment as a matter of law ("JMOL"), the Court hereby VACATES the prior order of this court denying said motions, and enters a new order GRANTING said motions. Plaintiffs' motion for a new trial is DENIED.

Designing Health, Inc. v. Flora, Inc., No. CV-98-4758, 2005 U.S. Dist. LEXIS 44768, at *5-6 (C.D. Cal Nov. 17, 2006). The court also denied DH's request for a new trial, stating:

> The order of the Circuit Court is clear on its face in compelling reversal of the denial of the JMOLs. However, Plaintiffs have argued they are entitled to a new trial because evidence that might have supported the damages awards was allegedly improperly

> excluded at trial. This is an issue that should have been raised on appeal, either in the briefing or in the Petition for Rehearing. It is not for this court to now, for the first time, consider what is, in essence, an appeal from the orders of the prior Judge in this case....However, as the issues were not raised on appeal, the appellate court did not consider a new trial or order this court to do so. Accordingly, this court has no discretion in the matter.

Id. The court also noted that even if it had discretion to grant a new trial it would not have exercised its discretion to grant a new trial in this case. *Id.* The court entered judgment on January 23, 2006, stating: "(1) Plaintiffs [DH] shall take nothing from Defendants Flora Inc., Flora Manufacturing and Distributing, Ltd., and Udo Erasmus on their claim for fraud; (2) Plaintiffs [DH] shall take nothing from Udo Erasmus on their claim for breach of fiduciary duty; and (3) costs be awarded to said Defendants under Federal Rule of Civil Procedure 54(d)." *Final Judgment*, at 1.

III.

This court reviews the interpretation of its own mandate de novo. *Engel Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1382 (Fed. Cir. 1999); *see also Tronzo v. Biomet, Inc.*, 236 F.3d 1342 (Fed. Cir. 2001).

DH argues on appeal that the district court erred in finding that the Federal Circuit's decision mandated entry of JMOL in favor of both Flora and Erasmus on damages, and thus precluded a new trial on damages. DH urges that *Weisgram v. Marley Co.*, 528 U.S. 440, 120 S. Ct. 1011, 145 L. Ed. 2d 958 (2000), implies a notice requirement whereby a court of appeals must be explicit when it directs a district

court to enter judgment for the jury verdict loser in order to put the jury verdict winner on notice that it must seek a new trial before the court of appeals. According to DH, absent this explicit notice, a court of appeals' silence in the mandate should not be construed by the district court as requiring entry of judgment for the jury verdict loser. Rather, the jury verdict winner should be free to seek, and the district court should have the discretion to grant, a new trial on remand. DH further argues that the district court's denial of a new trial on damages was inconsistent with DH's Seventh Amendment right to a jury trial. DH further outlines several alleged evidentiary failings by the district court which DH asserts support allowing a new trial on damages.

Flora and Erasmus counter that the rule of mandate divests the district court of jurisdiction to do anything more than whatever actions are necessary to carry out the mandate. According to Flora and Erasmus, the district court properly denied DH a new trial because the mandate in this case did not remand any issues to the district court, and the only action left within the district court's jurisdiction was to reverse its prior denial of Flora's and Erasmus' JMOL motions. Flora and Erasmus assert that the Seventh Amendment is not violated when a trial judge determines that evidence supporting an element of a cause of action is legally insufficient for the jury to render a verdict on the claim. Flora and Erasmus further counter that DH's failure to timely object during trial to the court's process for deciding admissibility of exhibits and resolution of the evidentiary issues and such failure to raise those issues in *DH I* precludes DH from now raising them.

We have jurisdiction over this appeal under 28 U.S.C. § 1295(a)(1).

IV.

Neely v. Martin K. Eby Construction, definitively ruled that a court of appeals, after reversing the denial of a party's motion for JMOL (then styled "judgment n.o.v."), may itself order dismissal or direct entry of judgment for that party. 386 U.S. 317, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967). In doing so, the Court determined that a grant of JMOL at the appellate level is consistent with both the Seventh Amendment's right to a jury trial and the statutory grant of appellate jurisdiction. *Id.* at 322 ("As far as the Seventh Amendment's right to jury trial is concerned,...there is no constitutional bar to an appellate court granting judgment *n. o. v.* Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment *n. o. v.* on appeal.") (internal citation omitted). The Court in *Neely* went on to discuss, *inter alia*, the proper procedural practice under Federal Rule of Civil Procedure 50(d)[1] in cases where the

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[1] Fed. R. Civ. P. 50(d) states:

Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

appellate court sets aside a trial court's denial of a Rule 50(b)[2] motion for JMOL, explaining that "Rule 50(d) expressly preserves to the party who prevailed in the district court the right to urge that the court of appeals grant a new trial should the jury's verdict be set aside on appeal." *Id.* at 323. In cases where an appellate court sets aside a jury verdict based on insufficient evidence, the Court explicitly noted that:

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[2] Fed. R. Civ. P. 50(b) states:

Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under subdivision (a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment or — if the motion addresses a jury issue not decided by a verdict — no later than 10 days after the jury was discharged. The movant may alternatively request a new trial or join a motion for a new trial under Rule 59.

In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

> [T]here remain important considerations which may entitle [plaintiff-appellee] to a new trial. The erroneous exclusion of evidence which would have strengthened his case is an important possibility. Another is that the trial court itself caused the insufficiency in plaintiff-appellee's case by erroneously placing too high a burden of proof on him at trial. But issues like these are issues of law with which the courts of appeals regularly and characteristically must deal....[I]f the plaintiff's verdict is set aside by the trial court on defendant's motion for judgment *n.o.v.*, plaintiff may bring these very grounds directly to the court of appeals without moving for a new trial in the district court. Final action on these issues normally rests with the court of appeals.

Id. at 327-28. Accordingly, the Court in *Neely* determined that Rule 50(d) provides adequate opportunity for a plaintiff-appellee to present, either in his brief or in a petition for rehearing, his grounds for a new trial in the event his verdict is set aside by the court of appeals. *Id.* at 329.

Given that it was permissible for this court in *DH I* to direct entry of judgment below in favor of Flora and Erasmus, we must determine if that is in fact what our mandate did. "[A] lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest." *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 140-41, 60 S. Ct. 437, 84 L. Ed. 656 (1940) (citing *Inre Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56, 16 S. Ct. 291, 40 L. Ed. 414 (1895)). An issue within the scope of the initial judgment of a district court is necessarily incorporated within the scope of a court

of appeals' mandate, and remanding the case to the district court without instructions to revisit the issue forecloses further review on remand. *See Tronzo*, 236 F.3d at 1348; *see also Engel Indus.*, 166 F.3d at 1382 ("[T]he *Engel III* court did not order a remand on any of the issues presented on appeal. Therefore the scope of the *Engel III* mandate, and thus the scope of the matters removed from the district court's jurisdiction, is coterminous with the scope of the issues deemed presented on appeal."). However, "[w]hile a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 168, 59 S. Ct. 777, 83 L. Ed. 1184 (1939) (citing *In re Sanford*, 160 U.S. 247, 16 S. Ct. 291, 40 L. Ed. 414). Therefore, the question is what issues were within the scope of the initial district court judgment and subsequent appeal in *DH I*, and consequently were finally decided by the mandate, and what other issues, if any, did the appellate court's mandate leave for the district court to decide.

This court's mandate in *DHI* left the district court with no additional issues to dispose of, and the only thing left for the district court to do was to grant JMOL in favor of Flora and Erasmus with respect to damages. Notably, the previous opinion by this court did not order remand of any issues on appeal; it only 'affirmed-in-part and reversed-in-part' the decision of the district court. *DH I*, 132 Fed. Appx. at 834. In the previous appeal, Flora and Erasmus appealed the decision of the district court denying their motion for JMOL regarding, *inter alia*, the jury's award of damages resulting from fraud. *Id.* at 827. This court reversed the district court's denial of JMOL as to the fraud damages, finding the record evidence was insufficient as a matter of law. *Id.* at 834. Additionally, Erasmus appealed, *inter alia*, the district court's denial of his motion for JMOL regarding the jury's award of

damages for breach of fiduciary duty. *Id.* at 827. This court reversed the district court's denial of JMOL as to the breach of fiduciary duty damages, noting that the admission of certain exhibits at trial supporting fraud damages was improper, and that, even if the exhibits had been properly admitted, the evidence presented by DH was insufficient as a matter of law to support the breach of fiduciary duty damages award. *Id.* at 833. Under these circumstances, the only thing left for the district court to do was to do the opposite of its previous action denying Flora and Erasmus JMOL with respect to damages-that is, to grant the Flora and Erasmus motions for JMOL on damages.

None of DH's arguments to the contrary are convincing. As noted, DH urges that *Weisgram* contains an implicit "notice due process requirement" that requires a court of appeals to explicitly direct the district court to enter judgment against the jury verdict winner if such is the intended outcome. The Court in *Weisgram* determined that the authority of courts of appeals to direct the entry of judgment as a matter of law extends beyond the situation addressed in *Neely* to include cases in which, on the appellate court's excision of erroneously admitted testimony, insufficient evidence remains to support the jury's verdict. *Weisgram*, 528 U.S. at 444. We see nothing in *Weisgram* that implies a "notice due process requirement." Furthermore, the text of Federal Rule of Civil Procedure 50(d) alone is adequate to put any plaintiff-appellee on notice of the proper procedure to follow when a district court's denial of JMOL is overturned on appeal.

DH also relies on *Exxon Chemical Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475 (Fed. Cir. 1998), to argue that silence in an appellate court's mandate with respect to granting a new trial should be interpreted as vesting discretion

in the district court to do so. In *Exxon*, the district court had interpreted a mandate in a prior appeal to this court as prohibiting the district court from granting a new trial. *Id.* at 1477. This court held, however, because the prior opinion was confined to the issue of literal infringement, the mandate did not deprive the district court of the power to grant Exxon's motion for a new trial on infringement under the doctrine of equivalents. *Id.* *Exxon* does not help DH because our prior opinion considered and disposed of all issues DH now asserts as grounds for a new trial. DH outlines several alleged evidentiary failings by the district court that it asserts support allowing a new trial on damages because the excluded evidence would provide the necessary support for a damages verdict that this court found lacking in *DH I*. The issue of the sufficiency of the evidence to support a damages verdict was undeniably before this court on appeal in *DH I*:

> On appeal...defendants argue that the award of damages in favor of the plaintiffs constituted error for several reasons....[D]efendants contend that DH failed to offer any evidence of out-of-pocket losses....[T]hey argue that DH did not have sufficient relevant operating history to establish lost profits for its health supplements product for humans, and that it failed to offer evidence sufficient to show: (1) what profits, if any, it would have made in the retail health food store market had it not entered into the distribution agreements with the Flora Companies, and (2) that such profits would have been more than the profits that DH made from the Flora Companies' marketing and sales.

DHI, 132 Fed. Appx. at 830. The district court's evidentiary rulings came under scrutiny in *DH I*, and DH had a full and fair opportunity to raise any evidentiary issues relevant to the

damages determination during its first appeal. *See, e.g.*, *id.* at 832 ("DH contends that the exhibits in the 1500 Series were properly admitted into evidence as summaries under Rule 1006 because they are based on evidence that was otherwise admissible at trial and that was reasonably available to Erasmus."). To the extent DH did not raise particular arguments in support of the jury verdict on damages, or in the alternative in support of a new trial on damages, during the first appeal in *DH I*, either in its briefing on appeal or petition for rehearing, those issues are waived. *See Tronzo*, 236 F.3d at 1349 (concluding that appellee's belated attack on the punitive damages award was foreclosed by the appellate court's mandate in the first appeal because appellee could have raised a challenge to the punitive damages award in the first appeal but did not).

CONCLUSION

The district court properly interpreted this court's mandate in *DH I* as compelling grant of JMOL in favor of Flora and Erasmus and as foreclosing a new trial on any issues within the scope of the mandate in *DH I*. Because the district court did not err in reversing its previousdenial of JMOL and denying DH's request for a new trial, we affirm.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2006-1244

[Filed April 3, 2007]

DESIGNING HEALTH, INC.,
Plaintiff-Appellant,

and

BERNARD COLLETT and
ROBERT MACINTOSH COLLETT,
Plaintiffs/Third Party Defendants-Appellants,

and

COLLETT VETERINARY CLINIC, INC. and
COLLETT FAMILY TRUST,
Third Party Defendants,

v.

UDO ERASMUS,
Defendant/Third Party Plaintiff-Appellee,

and)
)
FLORA, INC., FLORA MANUFACTURING)
AND DISTRIBUTING, LTD.,)
)
THOMAS GREITHER and)
GABRIEL LIGHTFRIEND,)
Defendants-Appellees.)
)

OPINION

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellants and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on April 10, 2007.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA,
WESTERN DIVISION

Case No. CV 98-4758 GPS(CWx)

[Filed November 17, 2005]

Designing Health, Inc. et al.	)
	)
v.	)
Flora, Inc. et al.	)
	)

JUDGES: HONORABLE GEORGE P. SCHIAVELLI, JUDGE.

OPINION

PROCEEDINGS: Plaintiffs' Motions for New Trial and Defendants' Motion's for Entry of Judgment (In Chambers)

The Court has read and considered the motions filed by all parties, the documents filed in support of and opposition to said motions and has considered the arguments of counsel raised at the hearing on November 14, 2005. Pursuant to the Federal Circuit's June 1, 2005 opinion and August 10, 2005 mandate ordering reversal of this Court's order denying Defendants' motions for judgment as a matter of law ("JMOL"), the Court hereby **VACATES** the prior order of

this Court denying said motions, and enters a new order. **GRANTING** said motions. Plaintiffs' motion for a new trial is **DENIED.**

The order of the Circuit Court is clear on its face in compelling reversal of the denial of the JMOLs. However, Plaintiffs have argued they are entitled to a new trial because evidence that might have supported the damages awards was allegedly improperly excluded at trial. This is an issue that should have been raised on appeal, either in the briefing or in the Petition for Rehearing. *See Weisgram v. Marley Co.*, 528 U.S. 440, 454-455, 120 S. Ct. 1011, 145 L. Ed. 2d 958 and n.11 (2000); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 329, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967). It is not for this Court to now, for the first time, consider what is, in essence, an appeal from the orders of the prior Judge in this case. Had the issue been raised in the Circuit Court, and had that court determined the rulings relating to the evidence constituted error, that court could then have ordered a new trial or remanded the matter to this Court with instructions to consider whether to grant a new trial. However, as the issues were not raised on appeal, the appellate court did not consider a new trial or order this Court to do so. Accordingly, this Court has no discretion in the matter.

However, as indicated by the Court at the hearing, even if this Court had discretion, it would be exercised in favor of Defendants. As noted above, Plaintiffs failed to preserve their appellate record on the evidentiary issues they now seek to raise, and it is not proper for this Court to review the orders entered in this case by the prior Judge. Moreover, as this Court did not conduct the trial, it is in no better position than the Circuit Court to determine whether a new trial is proper. Finally, the failure of Plaintiffs to raise the evidentiary issues

they now raise, after having had ample opportunity to do so, militates against discretion being exercised in their favor.

Defendants are ordered to submit a proposed judgment in accord with the Court's ruling by **December 2, 2005.**

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV-984758 GPS (Cwx)

[Filed January 23, 2006]

DESIGNING HEALTH, INC. Et al.,)
Plaintiffs,)
)
v.)
)
UDO ERASMUS, et al.,)
Defendants.)

JUDGMENT

Motion for Entry of Judgment having been granted pursuant to the Federal Circuit's mandate of August 10, 2005, and this Court's Order of November 17, 2005, it is hereby ORDERED, ADJUDGED, AND DECREED that (1) Plaintiffs shall take nothing from Defendants Flora, Inc., Flora Manufacturing and Distributing, Ltd., and Udo Erasmus on their claim for fraud; (2) Plaintiffs shall take nothing from Defendant Udo Erasmus on their claim for breach of fiduciary duty; and (3) costs be awarded to said Defendants under Federal Rule of Civil Procedure 54(d).

IT IS SO ORDERED.

Dated this 23rd day of January, 2006.

/s/
George P. Schiavelli
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

03-1438, 03-1439, 03-1440, 03-1441, 03-1442, 03-1443

[Filed June 1, 2005]

DESIGNING HEALTH, INC.,
Plaintiff-Cross Appellant,

and

BERNARD COLLETT and
ROBERT MACINTOSH COLLETT,
Plaintiffs/Third Party Defendants-
Cross Appellants,

and

COLLETT VETERINARY CLINIC, INC. and
COLLETT FAMILY TRUST,
Third Party Defendants-Appellees,

v.

UDO ERASMUS,
Defendant/Third Party Plaintiff-Appellant,

and)
)
FLORA, INC., FLORA MANUFACTURING)
AND DISTRIBUTING, LTD.,)
)
and)
)
THOMAS GREITHER,)
Defendants-Appellants,)
)
and)
)
GABRIEL LIGHTFRIEND,)
Defendant.)
)

JUDGES: Before LOURIE, CLEVENGER, and SCHALL, Circuit Judges. SCHALL, Circuit Judge.

OPINION

DECISION

Udo Erasmus ("Erasmus"), Flora, Inc. and Flora Manufacturing and Distributing, Ltd. (the "Flora Companies"), and Thomas Greither ("Greither")[1] appeal the decision of the United States District Court for the Central District of California denying their motion for judgment as a matter of law ("JMOL") regarding (1) a jury verdict that they were liable for fraud; (2) the jury's award of damages resulting from that fraud; and (3) the jury's verdict that they

[1] We refer to Erasmus, the Flora Companies, and Greither collectively as "defendants."

were liable for conspiracy to commit fraud. *Designing Health, Inc. v. Erasmus*, 2003 U.S. Dist. LEXIS 26512, Nos. CV 98-4758, 99-9088 (C. D. Cal. May 2, 2003) (*"Order"*). Erasmus alone appeals (1) the district court's denial of his motion for JMOL regarding the jury's verdict that he was liable for breach of fiduciary duty; (2) the jury's award of damages for that breach; and (3) the district court's grant of summary judgment dismissing his counterclaim for libel. *Order*, 2003 U.S. Dist. LEXIS 26512, [slip op.] at 20.

For their part, Designing Health, Inc. ("DH") and Bernard Collett and Robert MacIntosh Collett (the "Colletts")[2] cross-appeal with respect to the following: (1) the district court's dismissal with prejudice of DH's patent infringement claims, *Designing Health, Inc. v. Erasmus*, 2002 U.S. Dist. LEXIS 27790, CV 98-4758 LGB (C.D. Cal. Feb. 28, 2002); (2) the district court's ruling that Greither was not subject to punitive damages as a result of fraud against DH, *Designing Health, Inc. v. Erasmus*, CV 98-4758 LGB (C. D. Cal. Nov. 8, 2002); (3) the district court's award of attorney's fees to Flora for defense of DH's patent infringement and unfair competition claims, *Order*, 2003 U.S. Dist. LEXIS 26512, [slip op.] at 33; (4) the district court's award of attorney's fees to Erasmus for defending against DH's patent infringement and unfair competition claims, *id.*; and (5) the denial of DH's claim against Erasmus for attorney's fees, *id.*, 2003 U.S. Dist. LEXIS 26512, [slip op.] at 30.

For the reasons set forth below, we conclude that the damages awards against Erasmus and the Flora Companies for fraud cannot stand. Accordingly, the judgment against Erasmus in the amount of $132,144 and the judgment against

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[2] We refer to DH and the Colletts collectively as "plaintiffs."

the Flora Companies in the amount of $1,280,000 for fraud are reversed. Also reversed is the judgment against Erasmus in the amount of $747,144 for breach of fiduciary duty. In all other respects, the final judgment of the district court is affirmed. Thus, we *affirm-in-part* and *reverse-in-part*.

DISCUSSION

I.

Between 1992 and 1994, the Colletts developed an animal food supplement product based on flax and other oil seeds. The Colletts formed DH in March of 1994, in order to manufacture and produce the animal supplement, and later, a human version of the supplement. The flax seed product, bearing the name "Udo's Original," was marketed by Udo Erasmus, an author of books on nutrition. Erasmus served as a consultant and a director of DH until his resignation in June of 1998.

Thomas Greither is the president and owner of the Flora Companies, which also specialize in health food products and supplements. Erasmus worked separately with the Flora Companies in order to market similar "Omega 3" and "Omega 6" health supplement products under the name "Udo's Choice."

DH and the Colletts brought suit against Erasmus, the Flora Companies, and Greither in the Central District of California, asserting various claims. Two of those claims are relevant to this appeal. First, plaintiffs asserted a claim of fraud and conspiracy to commit fraud, based on events surrounding a March 1996 meeting between the parties in Anaheim, California. Fifth Amended and Supplemental Complaint at 9. Specifically, plaintiffs alleged that Erasmus,

the Flora Companies, and Greither represented that "if Plaintiff DH would terminate its present Canadian distributors, and if Plaintiff DH would terminate its distributors which sold DH products to health food stores in the United States,...Defendants Flora Inc., and Flora Ltd., would, on a best-efforts basis, promote, exclusively distribute and sell Plaintiff DH's products in Canada and exclusively in the U.S. to health food stores." *Id.* Plaintiffs also alleged that Erasmus, the Flora Companies, and Greither represented that "if Plaintiff DH would agree to cease using its present packaging design (used by Plaintiff DH from November 1993 into 1996), which included the designation 'Udo's Original,' and at times a picture of Defendant Erasmus, and would agree to use the designation 'Udo's Choice' on DH's products, Flora Inc., and Flora Ltd., on an exclusive best-efforts basis, would sell and place DH's products in four thousand (4,000) health food stores which carried Flora Ltd. and Flora Inc.'s products in Canada and the United States." *Id.* at 10. Plaintiffs further alleged that Greither promised that the Flora Companies would be selling 15,000 to 20,000 units per month of DH's product by the end of 1997 and 30,000 to 40,000 units per month by the end of 1998. Plaintiffs assert that as a result of defendants' representations, DH entered into distribution agreements with the Flora Companies.

According to the complaint, however, defendants' real intent was: "(1) to have Plaintiff DH relinquish its independent goodwill in the trade designation 'Udo's Original' in which DH had expended considerable expense and resource to develop in the marketplace, and (2) to have DH limit, in 1996 and 1997, its independent marketing and promotion of DH's products, and (3) to have DH limit its development of its independent goodwill and sales, while Defendants secretly undertook to develop products competitive to DH, which Defendants would then pass off as

DH's products, using the same formula, trade dress and labels of DH, claiming to retail customers that DH was either 'out of business, 'or that the Defendants' products 'were in fact the replacement products for DH products.'" Fifth Amended and Supplemental Complaint at 12.

In their complaint, DH and the Colletts also charged that Erasmus breached a fiduciary duty to DH. Plaintiffs alleged that, while a director of DH, Erasmus entered into agreements with the Flora Companies under which he created, marketed, and developed products that directly competed with the products of DH. Plaintiffs also alleged that, while a director of DH, Erasmus disclosed proprietary confidential information to the Flora Companies and induced DH to invest considerable sums in advertising and promoting Erasmus' likeness in association with DH's food supplement products. At the same time, plaintiffs asserted, Erasmus entered into an agreement with Greither that provided that Greither and Erasmus would jointly own all rights in Erasmus' name and likeness for use in marketing food supplement products. Fifth Amended and Supplemental Complaint at 3-4.

Plaintiffs asserted that the following recovery was warranted as a result of the alleged fraud: (i) profits that DH would have earned had it not entered into the distribution agreements with the Flora Companies ("lost profits" theory); (ii) costs DH incurred in reliance on the alleged misrepresentations ("out-of-pocket loss" theory); and (iii) profits that DH would have earned under the distribution agreements into which it entered with the Flora Companies, had the representations upon which plaintiffs relied been true ("benefit of the bargain" theory). As far as the breach of fiduciary duty claim against Erasmus was concerned, DH asserted that it was entitled to recover: (i) payments it had made for the purpose of promoting Designing Health while

using Erasmus as its spokesman; and (ii) those payments it had made to Erasmus while he served as a director and manager of Designing Health.

In due course, the case proceeded to trial on the fraud, conspiracy to commit fraud, and breach of fiduciary duty claims. At trial, DH presented the following evidence in support of its fraud damages claims: (1) the testimony of Bernard Collett that once DH entered into the distribution agreements with the Flora Companies, DH terminated its relationships with approximately four distributors who had produced somewhere in the range of $600,000 to $700,000 sales income during the six-month period prior to termination; (2) the testimony of Bernard Collett that DH's gross profit margin on sales to the Flora Companies under the distribution agreements was approximately $3 per unit; (3) evidence of DH's gross sales figures for pet health supplement products for the years 1993 through 1997; and (4) evidence of DH's total sales of human health supplement products for the years 1995 through 2000.

As far as the breach of fiduciary duty damages claim was concerned, DH presented evidence indicating what it said it spent in connection with its relationship with Erasmus for the promotion of its health supplement products. This evidence was embodied in exhibits referred to as the "15000 Series." During trial, Bernard Collett described the 15000 Series as:

> a compilation of expenditures of Designing Health from inception in 1994 that were costs to promote the goodwill of Udo Erasmus on our promotional material, our labels, his book promotions, and all of the things that we had done over those years to promote Designing Health, using him as the principal spokesman.

Tr. at 1525. According to DH, these payments totaled $445,750. DH also presented evidence of payments made to Erasmus as a director and manager of DH. According to DH, these payments totaled $245,818.

At the close of the evidence, the court gave the following instructions with respect to fraud damages and damages for breach of fiduciary duty:

> FRAUD AND DECEIT - DAMAGES - OUT OF POCKET RULE
>
> If you find that a party is entitled to a verdict on its claim for fraud or negligent misrepresentation, you must then award that party damages, if any, caused by the fraud or negligent misrepresentation upon which you base your finding of liability.
>
> The amount of the award should include:
>
> 1. Amounts actually and reasonably expended in reliance upon the fraud.
>
> 2. An amount which will compensate the party for any loss of profits or other gains which were reasonably anticipated and would have been earned by the party but for the fraud or negligent misrepresentation.

Court Instruction No. 42.

BREACH OF FIDUCIARY DUTY - ACTUAL DAMAGES

If you find in favor of Designing Health, you must determine the total dollar amount of its damages, if any, that were caused by the breach of fiduciary duty by Erasmus.

In determining such damages, you shall consider the following:

1. Any noneconomic losses or injuries which Designing Health has had or will probably have in the future;

2. Any economic losses which Designing Health has had or will probably have in the future, including:

(a) Anything of value or any profit Erasmus received as a result of the breach of fiduciary duty;

(b) Any loss of Designing Health's property or assets caused by the breach of fiduciary duty; or

(c) Any loss of profits or income which Designing Health could reasonably have expected to earn had the fiduciary duty not been breached.

Court Instruction No. 27.

The jury returned verdicts in favor of DH and the Colletts and awarded fraud damages against Erasmus in the amount of $132,144 (including punitive damages) and against the Flora Companies in the amount of $1,280,000. It awarded breach of fiduciary duty damages against Erasmus in the amount of

$747,144. As noted, the district court denied the defendants' post-trial JMOL motions.

II.

On appeal, in addition to challenging the judgment of fraud against them, defendants argue that the award of damages in favor of the plaintiffs constituted error for several reasons. First, defendants contend that DH failed to offer any evidence of out-of-pocket losses. Second, they urge that DH is not entitled to benefit-of-the-bargain damages as a matter of law. Finally, they argue that DH did not have sufficient relevant operating history to establish lost profits for its health supplement product for humans, and that it failed to offer evidence sufficient to show: (1) what profits, if any, it would have made in the retail health food store market had it not entered into the distribution agreements with the Flora Companies, and (2) that such profits would have been more than the profits that DH made from the Flora Companies' marketing and sales.

In response, DH contends that, under California law, it is entitled to benefit-of-the-bargain damages. According to DH, its benefit-of-the-bargain damages are equal to its expectancy under the distribution agreements. It argues that this expectancy can be determined based upon the following: (1) the testimony of Bernard Collett that DH's profit per unit of human product sold by the Flora defendants was $3.00; and (2) the Flora Companies' promise to sell 20,000 units per month by the end of 1997, and 40,000 units per month by the end of 1998. Based on the foregoing, DH argues that it is entitled to benefit-of-the-bargain damages totaling $1,620,000.00.

As for lost profits, at oral argument, counsel for DH argued that such profits could be established with reasonable certainty based on the evidence of DH's gross sales figures for pet products and for human products in the years prior to entering into the distributorship agreements with the Flora Companies. In that regard, DH relied on the testimony of Bernard Collett that DH terminated relationships with distributors who provided sales of $600,000 to $700,000 for the six-month period prior to their termination. According to DH, this data demonstrates that in the years prior to entering into the agreements, the ratio of sales of pet to human products was two-to-one. Thus, according to DH, it is reasonable to conclude that this ratio would have remained constant had DH not entered into the distributorship agreements, and it is possible to extrapolate lost profits based on DH's actual sales of pet products during the period of the agreements. Counsel for DH confirmed at oral argument that the above "data points" are the only evidence in the record to support a lost profits damages award against the Flora Companies.[3]

California's general tort recovery statute sets forth the following measure of damages:

> BREACH OF OBLIGATION OTHER THAN CONTRACT. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the

---

[3] DH fails on appeal to point to any evidence that was presented in the district court in support of its out-of-pocket loss theory of damages.

> detriment proximately caused thereby, whether it could have been anticipated or not.

Cal. Civil Code § 3333; *see also French v. Merrill Lynch*, 784 F.2d 902 (9th cir. 1986).

Under California law, in cases involving fraud where property is not exchanged, damages under section 3333 are limited to the "actual losses suffered because of the misrepresentation," regardless of whether a fiduciary relationship existed between the parties. *Gray v. Don Miller & Assocs.*, 35 Cal. 3d 498, 198 Cal. Rptr. 551, 674 P.2d 253, 256 (Cal. 1984) (quoting *Gagne v. Bertran*, 43 Cal. 2d 481, 275 P.2d 15 (Cal. 1954)). Under this measure of damages, a plaintiff can recover "out-of-pocket" losses and lost profits, but a plaintiff is barred from recovering "benefit-of-the-bargain" damages. *See Christiansen v. Roddy*, 186 Cal. App. 3d 780, 231 Cal.Rptr. 72, 78 (Cal. Ct. App. 1986) (Fifth District) ("The proper measure of tort damages is the 'out-of-pocket' measure; successful tort plaintiffs are not entitled to have damages computed on a contract or 'benefit-of-the-bargain,' theory." (citation omitted)); *Kenly v. Ukegawa*, 16 Cal. App. 4th 49, 19 Cal.Rptr.2d 771, 774 (Cal. Ct. App. 1993) (First District) ("If the 'wrong' had not been done, Kenly presumably would not have borrowed funds to purchase the note; if he incurred damages from that transaction, he is entitled to be made whole. However, Kenly is not entitled to placement in a better position than he would have occupied absent the fraud."); *Eckert Cold Storage, Inc. v. Behl*, 943 F. Supp. 1230, 1234 (E.D. Cal. 1996) ("Plaintiffs' position is not supported by the main line of case authority. Under this precedent, section 3333 does not provide for benefit of the bargain recovery, even if Grant acted as plaintiffs' fiduciary....Rather, plaintiffs' recovery must be limited to the losses proximately caused by Grant's

alleged misrepresentations: the damages awarded should place plaintiffs in the position they would have occupied had the misrepresentations not occurred." (citations omitted)).

Also under California law, it is well established that damages must be proven with "reasonable certainty" in both contract and tort cases. *See Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 961 (9th Cir. 2001); *see also Mann v. Jackson*, 141 Cal. App. 2d 6, 296 P.2d 120, 123 (Cal. 1956). Moreover, in order to recover damages for loss of profits, there must be a "satisfactory basis for estimating what the probable earnings would have been had there been no tort. If no such basis exists,...it may be necessary to deny such recovery." *Natural Soda Prods., Co. v. City of Los Angeles*, 23 Cal. 2d 193, 143 P.2d 12, 17 (Cal. 1943). Generally, the evidence must make reasonably certain the nature, occurrence, and extent of loss of prospective profits. *Piscitelli v. Friedenberg*, 87 Cal. App. 4th 953, 105 Cal.Rptr.2d 88, 114 (Cal. Ct. App. 2001).

We conclude that the evidence presented by DH in support of the fraud damages award is insufficient as a matter of law. First, as indicated, under California law, DH is not entitled to recover benefit-of-the-bargain damages. Second, DH has failed to establish lost profits with reasonable certainty. The testimony of Mr. Collett concerning the terminated distributors is insufficient for a number of reasons. As noted by the Flora Companies, the testimony fails to establish that DH terminated the distributors in reliance on the distribution agreements. Most importantly, it fails to establish the *profits*, if any, that DH derived from sales to the terminated distributors. The evidence of DH's gross sales figures for pet products and for human products in the years prior to entering into the distributorship agreements is also insufficient to establish damages. This evidence fails to

establish the *profits*, if any, that DH derived from sales of the human products prior to entering into the distribution agreements. In addition, DH offered no lay or expert testimony to establish prospective sales. Merely pointing to past sales is not enough, especially given the fact that DH had only recently entered into the market for sales of its product for humans.

Because the record evidence does not sufficiently support the jury's fraud damages award against defendants, the district court's denial of JMOL as to the fraud damages award is reversed.

As noted, Erasmus also appeals the judgment against him in the amount of $747,144 for breach of fiduciary duty. In challenging this damages award, Erasmus argues that the 15000 Series was improperly admitted under Federal Rule of Evidence 1006. This is so, according to Erasmus, because DH failed to establish that the underlying materials upon which the summaries are based were admissible in evidence, and because DH failed to make the materials reasonably available to Erasmus.

In response, DH contends that the exhibits in the 15000 Series were properly admitted into evidence as summaries under Rule 1006 because they are based on evidence that was otherwise admissible at trial and that was reasonably available to Erasmus. DH argues that the testimony of Marianne Rensing, DH's accountant, authenticates and establishes a foundation for the accounting documents that underlie the 15000 Series. With respect to Exhibit 15002, DH points to Ms. Rensing's testimony that she routinely and in the course of business supervised the creation of the check registers identified as Exhibits 13000 and 13001, which Bernard Collett later testified he used to create the summary identified as

Exhibit 15002. Tr. at 1527. DH fails to identify the check registers underlying the remaining exhibits of the 15000 Series.

Federal Rule of Evidence 1006 provides in relevant part:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Fed. R. Evid. 1006. Under Ninth Circuit law, "a proponent of a summary exhibit must establish a foundation that (1) the underlying materials on which the summary exhibit is based are admissible in evidence, and (2) those underlying materials were made available to the opposing party for inspection." *Amarel v. Connell*, 102 F.3d 1494, 1516 (9th Cir. 1997) (citing *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1259 (9th Cir. 1984)). "The purpose of the availability requirement is 'to give the opposing party an opportunity to verify the reliability and accuracy of the summary prior to trial.'" *Id.* (citing *Paddack*, 745 F.2d at 1261). Failure to make available the materials underlying a summary exhibit, renders that summary exhibit inadmissible, *Id.* (citing *United States v. Miller*, 771 F.2d 1219, 1238 (9th Cir. 1985)).

Exhibit 15002 purportedly is a summary of DH's expenditures, by check, in connection with the promotion of DH's health supplement products by Erasmus. The exhibit is based on Exhibits 13000 and 13001 - evidence that was

otherwise admissible and that was made available to Erasmus. Accordingly, we cannot say that the district court abused its discretion in admitting Exhibit 15002 into evidence under Rule 1006. With respect to the remaining exhibits in the 15000 Series, DH asserts that the exhibits were properly based on accounting documents authenticated by Ms. Rensing. However, as noted above, DH fails to identify the particular accounting documents upon which the summaries are based. In addition, it offers no support from the record that these documents were made available to Erasmus. Finally, the admission of the remaining exhibits in the 15000 Series was clearly prejudicial to Erasmus given DH's nearly singular reliance on the 15000 Series. *See City of Long Beach v. Standard Oil Co.*, 46 F.3d 929, 936 (9th Cir. 1995) (noting that evidentiary rulings are reviewed for an abuse of discretion and should not be reversed absent some prejudice).

The evidence presented by DH is insufficient as a matter of law to support the breach of fiduciary duty damages award. First, even if the entire 15000 Series had been properly admitted by the district court, the fact still remains that DH failed to present any evidence, in the form of lay or expert testimony, as to why all of the costs of promoting DH's health supplement products in connection with Erasmus constitute economic losses resulting from Erasmus's breach of fiduciary duty. Second, DH failed to present any evidence to explain why payments made to Erasmus as a director and manager of DH constitute economic losses resulting from Erasmus's breach of fiduciary duty.

Because the record evidence does not sufficiently support the jury's breach of fiduciary duty damages award against Erasmus, the district court's denial of JMOL as to the damages award is reversed.

III.

For the foregoing reasons, we reverse the damages awards against Erasmus and the Flora Companies for fraud in the amount of $132,144 and $1,280,000, respectively, as well as the damages award against Erasmus for breach of fiduciary duty in the amount of $747,144.

We have carefully considered, but have not found persuasive, all other arguments made by the parties regarding the remaining aspects of the district court's final decision. Thus, this court affirms: (1) the district court's denial of JMOL with respect to the jury's verdict of liability against Erasmus and the Flora Companies for fraud and conspiracy to commit fraud, and against Erasmus for breach of fiduciary duty; (2) the district court's grant of summary judgment dismissing Erasmus's counterclaim for libel; (3) the district court's dismissal with prejudice of DH's patent infringement claims; (4) the district court's exclusion of Greither from punitive damages; (5) the district court's award of attorney's fees to the Flora Companies for defending against DH's patent infringement and unfair competition claims; (6) the district court's award of attorney's fees to Erasmus for defending against DH's patent infringement and unfair competition claims; and (7) the denial of DH's claim for attorney's fees against Erasmus.

This court also denies the Flora Companies' motion for attorney's fees incurred in the defense of DH's cross-appeal of the district court's dismissal with prejudice of DH's patent infringement claims.

For the foregoing reasons, the decision of the district court is *affirmed-in-part* and *reversed-in-part*.

Each party shall bear its own costs.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-1438, -1439, -1440, -1441, -1442, -1443

[Filed August 16, 2005]

DESIGNING HEALTH, INC.,
Plaintiff-Cross Appellant,

and

BERNARD COLLETT and
ROBERT MACINTOSH COLLETT,
Plaintiff/Third Party Defendants-
Cross Appellants

and

COLLETT VETERINARY CLINIC, INC.
AND COLLETT FAMILY TRUST,
Third Party Defendants-Appellees,

v.

UDO ERASMUS,
Defendant/Third Party Plaintiff-Appellant,

and)
)
FLORA, INC., FLORA MANUFACTURING)
AND DISTRIBUTING, LTD., AND)
THOMAS GREITHER,)
Defendants-Appellants,)
)
and)
)
GABRIEL LIGHTFRIEND,)
Defendant.)
)

On Appeal from the United States District Court
For the Central District of California
Case No. 98-CV-4758 and 98-CV-9088

JUDGMENT

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED-IN-PART* and *REVERSED-IN-PART

ENTERED BY ORDER OF THE COURT

Dated JUN -1 2005 /s/
Jan Horbaly, Clerk.

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE FEDERAL COURT

03-1438, -1439, -1440, -1441, -1442, -1443

[Filed June 27, 2005]

DESIGNING HEALTH, INC.,
Plaintiff-Cross Appellant

and

BERNARD COLLETT and
ROBERT MACINTOSH COLLETT,
Plaintiffs/Third Party Defendants-
Cross Appellants,

and

COLLETT VETERINARY CLINIC, INC. and
COLLETT FAMILY TRUST,

Third Party Defendants-Appellees,

v.

UDO ERASMUS,
Defendant/Third Party Plaintiff-Appellant,

and

FLORA, INC., FLORA MANUFACTURING AND DISTRIBUTING, LTD.,	)
and	)
THOMAS GREITHER, Defendants-Appellants.	)
and	)
GABRIEL LIGHTFRIEND, Defendant.	)

Appeals from the United States District Court
for the Central District of California
in consolidated case nos. 98-CV-4758 and 98-CV-9088,
Judge Lourdes G. Baird

PETITION FOR REHEARING
Fed. Rule App. Pro. Rule 40

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I.

POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE COURT

1. The Designing Health Parties ("DHP") first respectfully request clarification by the Court to provide limited direction to the district court, that the case is remanded for a new trial on damages and punitive damages at the district court's discretion in accordance with Federal Rule of Civil Procedure Rule 50(d).

2. The DHP secondly, respectfully request that the Court clarify its opinion (DECISION at 12), that "...a plaintiff is barred from recovering "benefit-of-the bargain" damages...," to a holding consistent with California statutory and California Supreme Court authority that a defrauded plaintiff may be allowed recovery of "benefit-of-the-bargain" damages, depending upon the circumstances.

Introduction

By its Petition for Rehearing, the DHP,[1] first wish to avoid interpretive conflict as to the mandate, and therefore seek clarification.[2]

This Court's DECISION's concluding statement (P. 16, Addendum No. 1), does not provide explicit direction to the lower court, and states:

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[1] This Court's June 1, 2005 DECISION, at 2, FN 2: "We refer to DH and the Colletts collectively as 'plaintiffs.'"

[2] The DHP anticipate disagreement by the parties before the district court below as, to the interpretation of this Court's DECISION.

"For the foregoing reason, the decision of the District Court is affirmed in part, and reversed in part."

This Court held as to fraud damages (P. 12):

"Because the record evidence does not sufficiently support the jury's fraud damages against defendants, the district court's denial of JMOL as to the fraud, damages award is reversed."

This Court held as to fiduciary duty damages (P. 15):

"Because the record evidence does not sufficiently support the jury's breach of fiduciary duty damages award against Erasmus, the district court's denial of JMOL as to the damages award is reversed."

As to liability, this Court's DECISION (P. 15) affirmed:

"(1) the District Court's denial of JMOL with respect to the jury's verdict of liability against Erasmus and the Flora companies for fraud and conspiracy to commit fraud, and against Erasmus for breach of fiduciary duty."

Given the Court's affirmance as to liability, and its reversal as to damages, Federal Rules of Civil Procedure, Rule 50(d), appears applicable, which provides in part:

"If the appellate court reverses the judgment, nothing in this rule precludes it (the appellate court) from determining that the appellee (the DHP) is (are) entitled to a new trial (in this circumstance as to damages and punitive damages), or from directing the

trial court to determine whether a new trial (on damages) shall be granted." Fed. Rule Civ. Pro., Rule 50(d).

II.

REQUEST FOR CLARIFICATION FOR DIRECTION UPON REMAND

The DHP suggest that further direction by this Appellate Court would avoid unnecessary disputes as to the intent of the mandate.

Upon review of appropriate authorities, it appears to the DHP that in those circumstances in which the Appellate Court reversed the denial of a JMOL, *as to liability* (not limited to damages), the Supreme Court provides in *Weisgram v. Marley Company*, 528 U.S. 440, 120 S. Ct. 1011, 145 L.Ed. 2d 958 (2000), that:

> "...if a court of appeals determines that the district court erroneously denied a motion for judgment as a matter of law, the appellate court may (1) order a new trial at the verdict winner's request or on its own motion, (2) remand the case for the trial court to decide whether a new trial or entry of judgment for the defendant is warranted, or (3) direct the entry of judgment as a matter of law. *Weisgram*, *Id.* at 451.

The DHP concede that this Court's apparent disinclination to select one of the three (3) alternative directions identified in *Weisgram*, *supra*, is consistent in this Court's DECISION

upholding the district court's finding of liability and reversing only as to damages.[3]

DHP is as well mindful of this Court's decision in *Exxon Chemical Patents, Inc., v. Lubrizol Corporation*, 137 F.3d 1475 (Fed. Cir. 1998), in which this Court in referencing *Neely Martin v. Eby Construction Co.*, 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967), *Exxon, supra* at 1480, interprets its own prior mandate, (in which this Court did not provide specific direction), holding that specific directions are not necessary in that:

> "...*Neely* likewise does not dictate that an appellate court's mandate must be read to prohibit a district court from granting a new trial unless the appellate court has specifically authorized it to do so." *Exxon, supra*, at 1482.

The DHP interpret this Court's DECISION as providing a remand to the district court for a determination for a retrial of the issues of damages and punitive damages as to the Flora Parties and Erasmus, leaving for the district court, to determine the nature of a re-trial, as provided by Federal Rule of Civil Procedure, Rule 50(d).

Notwithstanding that a further instruction may not be necessary, the DHP further suggest however, that one lesson derived from *Exxon Chemical, supra*, and *Laitram Corp v. NEC Corp.*, 115 F.3d 947 (Fed. Cir., 1997), is that litigants

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[3] Having searched, the DHP have not found an appellate authority which applied *Weisgram, supra* to the circumstance of when liability was upheld, and damages alone were reversed.

are prone to vigorously dispute the intent of an appellate court's mandate.

In *Exxon*, *supra*, 137 F.3d 1475, at 1483, in a second appeal, this Court interpreted its prior mandate, (initially reversing the district court's entry of judgment in favor of defendant), by reversing the district court's failure to consider plaintiff's motion for a new trial. In so doing this Court was required (inter alia) to expend two (2) pages of opinion to indicate that parties are to draw no inferences from this Appellate Court's lack of inclusion of the word "remand" in its prior appellate court's decision, *Exxon*, *supra*, at 1483.

The DHP are cognizant that this Appellate Court need not provide explicit directions.[4]

Notwithstanding the authorities referenced above, the DHP respectfully request the Court to clarify its decision by adding a direction that:

> "This court remands this case to the District Court pursuant to F.R.C.P. Rule 50(d), for a new trial on damages and punitive damages."

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[4] *5 Am.Jur.2, Appellate Review* § *788*, provides:

> "Where the remanding court does not give specific instructions, the trial court on remand is required to examine the appellate court's decision and determine what further proceedings would be proper and consistent with the opinion."

III.

ARGUMENT AS TO CLARIFICATION

DHP contend that clarification providing that a new trial on damages and punitive damages is appropriate at the trial court's discretion, is supported more particularly by the authorities this Court presented in its DECISION. This Court (P. 11) cites to *Christiansen v. Roddy*, 186 Cal.App.3d 780, 231 Cal.Rptr. 72 (Fifth District, 1986) for the holding that the DHP in their fraud claim "...(are) barred from recovering benefit-of-the-bargain damages." In *Christiansen*, *supra*, the California Courts of Appeal reversed the trial court's allowance of benefit-of-the-bargain damages, holding that the plaintiff could not recover potential lost interest income of 20%, based upon a finding of negligent misrepresentation of a promise of 20% profits, *Christiansen*, *supra*, at 790. The direction of the Appellate Courts in *Christiansen*, *supra* was to:

> "...*remand to the trial court for reconsideration of damages consistent with the discussion of interest herein*. In all other respects the judgment is affirmed. *Id.* at 791 (emphasis added).

This Court's DECISION (P. 11) also cites to *Kenly v. Ukegawa*, 16 Cal.App.4th 49, 10 Cal.Rptr.2d 771, 774 (Fourth Dist. 1993), where the California Courts of Appeal found that:

> "...the trial court awarded $800,000 as compensatory damages, based on its conclusion that Kenly would have made that amount of profit from a resale of the

farm if Ukegawa had honored his promise and sold the farm to him."[5]

In *Kenly, supra* after finding that "benefit-of-the-bargain" damages had been incorrectly applied, the Appellate Court directed that:

> "The damage award against (defendants) *is reversed for retrial solely on the issues of the proper amount of compensatory and punitive damages*...." *Kenly, supra*, at 58 (emphasis added).

IV.

REMAND UPON REVERSAL BASED UPON INADMISSIBILITY OF EVIDENCE, SUPPORTS A DIRECTION FOR A NEW TRIAL ON DAMAGES AND PUNITIVE DAMAGES

As to the inadmissibility of summary evidence as the basis for reversing the district court's denial of the JNOV as to breach of fiduciary duty damages as to Erasmus, this Court's DECISION (P. 14) twice refers to *Paddack v. Dave*

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[5] This Court's reliance upon *Kenly, supra*, as to limiting fraud to out-of-pocket damages, may be unsound in that *Kenly, supra*, involved the purchase and sale of real property in which California Civil Code 3343 is applicable and *Kenly, supra*, at 775, also specifically acknowledged that:

> "In some cases, however, lost profits are recoverable..." California Civil Code 3343(a)(4) (in) "fraudulent representations ...concerning the nature of the property," *Kenly, supra*, at 775.

Christensen, Inc., 745 F.2d 1254, at both 1259 and 1261, (9th Cir. 1984), in holding that the DHP's summary exhibits presented at trial below, were inadmissible. In *Paddack*, *supra*, the Ninth Circuit in reversing the damage award based upon inadmissible summaries, held:

> "We therefore reverse and remand this case *for a redetermination of the existence and scope of the Employer's liability in light of a proper* understanding of the applicable Federal Rules of Evidence. *Paddack*, *supra*, at 1263 (emphasis added).

The DHP Further Acknowledge That Denial Of This Motion For Panel Clarification As to Direction on Remand Provides No Adverse Inference

Again, referring to *Exxon*, *supra*, the DHP are aware that this Court has held that:

> "...no inferences can be drawn from the court's silence in response to Exxon's (in this case, the DHP's) request for clarification. Courts normally do not respond to petitions for rehearing and it would be a mistake to conclude that a court's non-response to an argument made in a rehearing petition necessarily means the court has rejected that argument on the merits. *Exxon*, *supra* at 1479.
>
> * * *
>
> The court's failure to grant a request for clarification could well reflect the view that clarification is not required, rather than an intention to rejection on the merits the legal argument on which Exxon sought clarification...(*see Laitram Corp.*, 115 F.3d at

951...(court of appeal's denial of request for clarification carries 'no inferential weight.')" *Exxon*, *supra*, at 1479.

As this Court also indicated in *Exxon*, *supra*, at 1483, the Supreme Court in *Sprague v. Ticonic National Bank*, 307 U.S. 161, at 168-169, 59 S. Ct 777, 83 L. Ed 1184 (1939), and the Ninth Circuit in *United States v. Cote*, 51 F.3d 178 (9th Cir. 1995), (which Ninth Circuit Opinion had previously "reversed ... but did not explicitly remand...") held that:

"..the absence of a specific remand directive did not bar the district court from ordering a new trial, as long as the new trial would not be inconsistent with the mandate of the earlier opinion ... as gleaned from the judgment together with the accompanying opinion. *United States v. Cote*, 51 F.3d at 1482, (9th Cir. 1995).

Notwithstanding the authorities cited above, DHP suggest clarification by which this Court includes an order of remand directing the district court to consider a new trial on damages and punitive damages.

V.

FRAUD AND BENEFIT-OF-THE-BARGAIN California Statutory Law Provides (In Certain Circumstances) Benefit Of The Bargain For Fraud

This Court found on several bases (DECISION at P. 12) that:

"We conclude that the evidence presented by DH in support of the fraud damages award is insufficient as a matter of law."

The DHP do not seek rehearing as to this Court's conclusion as to insufficient evidence (P. 12), but respectfully suggest clarification is appropriate as to the Court's holding that "...a plaintiff is barred from recovering 'benefit-of-the-bargain' damages..." (P. 11) and that:

> "...successful tort plaintiffs are not entitled to have damages computed on a contract or benefit of the bargain theory," (P. 11).

The DHP suggest that the DECISION should be clarified to find that the DHP: "...has not made a sufficient showing as to the record evidence that it is entitled to "benefit-of-the-bargain" damages under California law."

VI.

ARGUMENT AS TO BENEFIT OF THE BARGAIN DAMAGES FOR FRAUD

Not only does California law not bar a defrauded plaintiff from recovering "benefit-of-the-bargain damages...," in certain instances statutory authority specifically provides benefit-of-the-bargain damages to a defrauded plaintiff.

1. *California Commercial Code 2721* (goods, merchants) (Addendum No. 2), *Remedies For Fraud*, provides:

> "Remedies for material misrepresentation or fraud include all remedies available under this division for nonfraudulent breach. (Stats. 1963, c. 819, §2721.)"[6]

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[6] The statute and authorities hold pursuant to California UCC Section 2721 (DHP Brief at 70) benefit-of-the-bargain damages

California Commercial Code 2721, Comment Note 1 (Addendum No. 2) (to 2721), provides, in part:

> "This section is new, and its purpose, ...is to make the remedy of buyer or seller where there is fraud as broad as and coextensive with the remedies where fraud is absent. This section would perhaps change the rule of Civil Code 3343, stating the so-called 'out-of-pocket' rule of damages in fraud cases *and substitute or permit the so-called 'loss of bargain' rule under which the defrauded party is permitted to get the benefit he would have received if the representation had been true.*" "California Code Comment" (Addendum No. 2, attached) (emphasis added).

As early as 1965 the Ninth Circuit in interpreting California Commercial Code held in *Hartwell Corporation v. A. J. Baumb Trustee*, 345 F.2d 453, at 457 (9th Cir. 1965), 2 UCC Rep.Serv. 890, that:

> "We agree that in some instances the 'out-of-pocket' approach is a correct measure of damages and has been properly used in a number of cases. It is the general rule adopted by Section 3343 of the California Civil Code. But we cannot blindly adhere to this approach as the exclusive measure of damages....Many courts have recognized this approach as a reasonable method of damage calculation." *Hartwell, supra* at 457.

(breach of contract damages) as to a defrauded plaintiff.

2. California Civil Code 3343(a)(4) (as to real property transactions) specifically provides for benefit of the bargain fraud damages:

> "...where the defrauded party has been induced by reason of fraud to purchase or otherwise acquire the property in question an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property..."

3. California Supreme Court authority provides benefit of the bargain fraud damages in certain circumstances.

In *Lazar v. The Superior Court of Los Angeles County*, 12 Cal.4th 631, at 646, 909 P.2d 981, 49 Cal.Rptr.2d 377 (California Supreme Court, 1996), in the context of a fraudulent inducement of employment agreement held:

> "Because of the extra measure of blameworthiness inhering in fraud, and because in fraud cases we are not concerned about the need for "predictability about the cost of contractual relationships" (*ibid*) fraud plaintiffs may recover 'out-of-pocket' damages in addition to benefit-of-the- bargain damages" *Lazar*, *supra*, at 646.

This Court's DECISION (P. 11) relied upon *Exker Cold Storage, Inc., v. Behl*, 943 F.Supp.1230, 1234 (E.D. Cal. 1996), (P. 11) where a plaintiff's claim of negligent misrepresentation damages was based upon: "...advice by a tax advisor, resulting in (non-obtained) tax benefits," with plaintiff asserting that the plaintiff was entitled to damages equivalent to the benefit "had the tax advice been correct," *Exker Cold Storage, Inc., supra*, at 1234.

This Court's analysis (P.11), relying upon *Exker Cold Storage*, *supra*, appears to avoid the underlying determinative element of whether there is logically or legally protectable reliance "proximately caused...by alleged misrepresentation," *Exker*, *supra*, at 1234, as to the promise made under the circumstances. In *Exker Cold Storage, Inc.*, the reliance did not go to the promise that that tax advice was indisputably correct (nor would it be reasonable to assume that it did).

The DHP suggest that as provided by Commercial Code Section 2721 and Civil Code Section 3343(a)(4) "benefit-of-the-bargain," damages resulting from fraud are consistent with California jurisprudence, and are available under particular circumstances. "Purchasers were entitled to damages as benefit of bargain." "...benefit of bargain damages may appropriately be calculated as of the date of discovery of the fraud," *Salahutdin v. Valley of California*, 24 Cal.App.4th 555, at 568 (First Dist., 1994). *Fragale v. Faulkner*, 110 Cal.App.4th 229, at 239 (2nd Dist., 2003) ("measure of damages by a fiduciary not limited to out-of-pocket losses...").

Uniform Commercial Code 2306, *Output Requirements and Exclusive Dealings* (goods merchants):

> "If an estimate of output or requirements is included in the agreement, no quantity unreasonable disproportionable to may be tendered or demanded." Agreement that party would purchase 15,000 units during initial term merely meant defendant was required to buy "...at least 15,000 quantities during initial term of agreement." *Copylease Corp. of America v. Memorex Corp.*, 397 F.Supp. 853 (1975).

VII.

CONCLUSION

Though admittedly not required, the DHP respectfully suggests that the Court include a clarifying statement to be added to the DECISION indicating a remand for the district court's determination of a new trial on damages and punitive damages.

The DHP also respectfully suggest (while the Court's opinion as to vacatur of the fraud damages award rests upon several bases), that the DECISION (at P. 11) be modified to indicate that California jurisprudence does not preclude fraud damages based upon benefit-of-the-bargain, which the trial court in providing restitution determines on a case by case basis, depending upon the circumstances.

Respectfully submitted,

LAW OFFICES OF ALLEN HYMAN

Dated: June 27, 2005 By: _____

ALLEN HYMAN
Attorneys for Plaintiff-Cross Appellants, and Appellees, The DHI PARTIES

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-1438, -1439,-1440,-1441, -1442, -1443,-1457

[Filed July 12, 2005]

DESIGNING HEALTH, INC.,
Plaintiff-Cross Appellant,

and

BERNARD COLLETT and
ROBERT MACINTOSH COLLETT,
Plaintiffs/Third Party Defendants-
Cross Appellants,

and

COLLETT VETERINARY CLINIC, INC. and
COLLETT FAMILY TRUST,
Third Party Defendants-Appellees,

v.

UDO ERASMUS,
Defendant/Third Party Plaintiff-Appellant,

and	)
	)
FLORA, INC., FLORA MANUFACTURING	)
AND DISTRIBUTING, LTD.,	)
THOMAS GREITHER, and	)
GABRIEL LIGHTFRIEND,	)
Defendants-Appellants,	)
	)

APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
IN CONSOLIDATED Case Nos.
98-CV-4758 AND 98-CV-9088,

JUDGE LOURDES G. BAIRD

DEFENDANTS-APPELLANTS FLORA, INC., FLORA MANUFACTURING AND DISTRIBUTING, LTD., AND THOMAS GREITHER'S ANSWER TO PETITION FOR REHEARING

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July 12, 2005

CERTIFICATE OF INTEREST

(FCR 47.4)

Counsel for Flora, Inc., Flora Manufacturing and Distributing, Ltd., Thomas Greither and Gabriel Lightfriend certify the following:

The full name of every party or amicus represented by us are:

Flora, Inc.;

Flora Manufacturing and Distributing, Ltd.;

Thomas Greither;

Gabriel Lightfriend

The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by us is:

Not Applicable

All parent companies and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by us are:

Not Applicable

The names of all law firms and the partners or associates that appeared for the party or amicus now represented by us in the trial or agency or are expected to appear in this court are:

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INTRODUCTION

DH's Petition for Rehearing is terribly misleading. It purports to merely seek "clarification," but actually seeks relief which this Court already rejected in its decision and, in any event, is barred as a matter of law. First, DH asks the Court to "clarify" that it actually remanded the case to the district court for a limited retrial on damages even though this Court's decision does not say that at all. Second, DH asks the Court to "clarify" that a new jury should be instructed to apply a different measure of damages in a limited retrial even though DH has not, and cannot, meet the standard for challenging the initial jury instruction on damages as erroneous. DH cloaks its request in "clarification" terms to disguise its true intent: to obtain relief both inconsistent with this Court's decision and barred by law DH does not address.

Indeed, DH's decision to seek retrial now on illegitimate grounds reveals that it has no valid basis to obtain such relief so the only appropriate alternative is to enter judgment for defendants.

DH asks this Court to "clarify" that its decision does something it does not do — remand the case to the district court for a limited retrial on damages. But this Court's opinion does not order a remand anywhere and the effect is to remove from the district court's purview those issues decided on this appeal. DH cannot abide this, however, since it has no legitimate grounds for a new trial on any issue which this Court has not already decided. DH simply wants a "do-over" because it could not prove at trial it suffered any recoverable damages under the measure submitted to the jury.

By purportedly seeking "clarification" that the jury may be instructed on a different damages measure in another trial, DH actually tries to sidestep its failure to meet the legal standard on appeal to obtain such relief. In order to challenge the district court's original damages instruction as erroneous, however, DH must prove it made a proper and timely objection to that instruction at trial. But DH did not. And it cannot seek a retrial pursuant to a different damages instruction now merely because it could not meet its burden of proof in the first go-around. Indeed, DH chose to take that risk in the face of defendants' repeated challenges to its damages proof at every stage of the trial.

DH's decision to seek retrial now solely on issues this Court has already decided proves DH has no legitimate grounds for seeking such relief. DH has not identified any other grounds for retrial or suggested the record is insufficient to do so. Nor has DH cited any law which justifies the relief it seeks. Indeed, under California law, DH's failure to prove

fraud damages — an essential element of that cause of action — means the entire fraud claim fails as a matter of law. As a result of DH's insufficient request fornew trial here, the only appropriate disposition is to enter judgment for defendants.

Even if DH had right to a new trial, a complete trial would be required to preserve the defendants' jury trial rights under the Seventh Amendment. Liability and damages are too inextricably interwoven in this case to permit a partial retrial on damages without unduly prejudicing defendants. The verdict lacks the requisite specificity about the original jury's findings on liability to allow a second jury to determine its basis or properly calculate any award. Moreover, there could be no partial retrial on punitive damages against either the Flora Companies or Greither because the jury and the district court, respectively, already decided that DH is not entitled to punitive damages from them in any amount.

JUDGMENT SHOULD BE ENTERED FOR DEFENDANTS.

A. The Court's opinion and judgment do not remand any issues.

The Court does not order a remand in either its opinion or its judgment. *See* Op. at 15-16 and Judgt. When an appellate tribunal reverses the denial of a JMOL for insufficient evidence, there may be a right to a new trial (rather than having judgment entered for the defendant.) *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 327, 18 L.Ed. 75, 83 (1967); *see also Fed. R. Cir. Proc.* 50(d). In such cases, an appellate court has the authority, where appropriate, either to:

> "[(1)] order a new trial at the verdict winner's request or on its own motion, (2) remand the case for the trial court to decide whether a new trial or entry of judgment for the defendant is warranted, or (3) direct the entry of judgment as a matter of law for the defendant." *Weisgram v. Marley Co.*, 528 U.S. 440, 452, 145 L.Ed. 2d 958, 970 (2000)(internal citations omitted)(citing *Neely*, 386 U.S. at 327-330).

But the court of appeals '"should be constantly alert' to 'the trial judge's firsthand knowledge ofwimesses, testimony, and issues'..." *Weisgram*, 528 U.S. at 443; *see also Fed. R. Civ. Proc.* 50.[1] However, "[i]f the court of appeals concludes that further proceedings are unwarranted because the loser on appeal has had a full and fair opportunity to present the case, including arguments for a new trial, the appellate court may appropriately instruct the district court to enter judgment against the jury-verdict winner." *Weisgram* 528 U.S. at 444.

Here, the Court's opinion or judgment does not choose any of the *Weisgram* alternatives. In this situation, "[t]he scope of the matters removed from the district court's jurisdiction...is coterminous with the scope of the issues deemed presented to the court on appeal." *Engel Industries, Inc. v. The Lockformer Company*, 166 F.3d 1379, 1382 (Fed. Cir. 1999)(internal citations omitted). In other words, "[a]ll such appealed issues are withheld from further consideration

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[1] Since the filing of this appeal, the district court judge in this case, The Honorable Lourdes G. Baird, has retired, http://air.fjc.gov/servlet, and the case has thus been reassigned to another judge (The Honorable George P. Schiavelli). As a result, the district court in this case would not be in any better position than this Court to consider whether a new trial is proper.

by the district court, as they are included within the [court's] mandate." *Id.*.

This does not mean a district court cannot consider a new trial:

> "[F]ollowing appellate disposition, a district court is free to take any action that is consistent with the appellate mandate, as informed by both the formal judgment issued by the court and the court's written opinion..." *Exxon Chemical Patents, Inc. v. The Lubrizol Corporation*, 137 F.3d 1475, 1484 (1998).

Where appropriate, the district court may still consider a new trial request on non-appealed issues. *See id.* at 1482-83; *see also Engel,* 166 F.3d at 1383.

However, nowhere in its opinion or judgment does the Court direct a remand of any issue at this time.

B. Judgment should be entered for defendants.

1. DH cannot meet its burden for new trial.

A plaintiff-appellee whose judgment is reversed for insufficient evidence may seek a new trial by petitioning the court of appeals for rehearing. *See Neely*, 386 U.S. at 328-29. Indeed, the Supreme Court encourages the losing plaintiff-appellee to seek retrial in this manner, because the record is likely to be a full one, and the appellate court can avoid further proceedings where appropriate. *See id.*

Although DH tries to couch certain portions of its petition as a "clarification" request, DH's petition is obviously a request for new trial on the grounds that the jury was

improperly instructed on the measure of fraud damages. *See, e.g.*, Pet. at 1 and 15 (request for "rehearing" on issue of retrial and request that opinion be "modified" on retrial to permit different measure of damages). As defendants argued on appeal, the district court, with DH's tacit approval, properly instructed the jury below on fraud damages using an out-of-pocket and lost profits measure that did not include the possibility of an expectancy, or benefit-of-the-bargain, recover. *See* Flora Resp. Brief at 13-15. This Court rejected DH's arguments to the contrary. DH tries to overturn this result by asking the Court to "modify" its opinion to permit the district court to determine, "on a case by case basis, depending on the circumstances," whether benefit-of-the bargain damages are available. Pet. at 15. But DH is really challenging the prior damages instruction as improper because it wants the jury in any retrial to be instructed to apply a different measure of damages. DH does not want to candidly request such relief, however, because it cannot possibly satisfy the applicable standard.

The requirement for obtaining a new trial on appeal based on allegedly improper jury instructions is clear:

> "A party seeking to alter a judgment based upon erroneous jury instructions must establish that (1) it made a proper and time objection to the jury instructions, (2) those instructions were legally erroneous, (3) the errors had prejudicial effect, and (4) it requested alternative instructions that would have remedied the error." *Eli Lily & Co. v. Aradigm Corporation,* 376 F.3d 1352, 1360 (2004); *see also Fed. R. Civ. Proc. 51*; *Voohries-Larson v. Cessna Aircraft Co.*, 241 F.3d 707,713 (9th Cir. 2001).

DH does not even remotely satisfy these requirements:

> "[D]HI instead argues at 70 that the district court's instruction was wrong. ...
>
> DHI's proposal of an additional damage instruction is besides the point. DHI did not propose a benefit-of-the-bargain instruction (*see* A14650-113, the instructions referenced by DHI at page 70) or even suggest that the Flora defendants' proposed instruction was an incorrect statement of the law (A30965-30993), and thus cannot assert error on appeal. *See Voorhiees-Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 713, (9th Cir. 2001). DHI also cannot claim error, as it did not appeal from the district court's failure to give its instructions or the giving of the Flora defendants' instruction." The Flora Companies' Rep. Brief at 14-15 (footnote omitted).

DH's argument at pages 10 through 14 of its petition (regarding the appropriate damage measure) fails for these same reasons (*i.e.*, failure to appeal and waiver), as well as those articulated in the Flora Companies' briefs. Brief at 38-47; Resp. Brief at 13-17.

2. DH has no other reason for granting a new trial.

DH does not even purport to identify any other basis for a new trial. When, as here, neither the plaintiff-appellee nor the record reveals a new trial issue that was not previously resolved due to no fault of the plaintiff-appellee (such as the erroneous exclusion of evidence, or an improper burden of

proof), the court of appeals may order judgment-as-a-matter-of-law for the successful appellant-defendant. *Neeley,* 386 U.S. at 325-27.

DH was aware at every stage of the case that defendants challenged the sufficiency of its damage evidence, yet it chose to forge ahead. *See Lujan v. National Wildlife Federation,* 497 U.S. 871,897, 111 LEd. 2d 695 (1990)("[A] litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk."). Accordingly, the Court should direct the entry of judgment in defendants' favor.

Similar, but even less compelling, circumstances compelled the granting of judgment-as-matter-of-law for the appellant-defendant in *Weisgram,* 528 U.S. 440. There, the Supreme Court held:

> "After holding Weisgram's expert testimony inadmissible, the Court of Appeals evaluated the evidence presented at trial in the light most favorable to Weisgram, and found the properly admitted evidence insufficient to support the verdict....Weisgram offered no specific grounds for new trial in the Eighth Circuit. Even in the petition for rehearing, Weisgram argued only that the appellate court had misapplied state law, did not have the authority to direct judgment, and had failed to give adequate deference to the trial court's rulings....The Eighth Circuit concluded that this was not a 'close case.' In these circumstances, the Eighth Circuit did not abuse its discretion by directing the entry of judgment for Marley, instead of returning the

> case to the District Court for further proceedings." *Weisgram,* 528 U.S. at 456 (internal citations omitted).

The circumstances here are even more compelling than in *Weisgram,* because *DH's* evidence in support of the verdict was not deficient due to any evidentiary exclusion. Rather, it was deficient because DH simply failed to offer evidence sufficient to sustain the verdict consistent with the jury instructions given.

DH's attempt to distinguish *Weisgram* on the ground that it involved a reversal of liability, not damages, makes no sense. Nowhere in *Weisgram,* nor any other referenced decision, is this distinction made. Moreover, the same core fact exists in both cases: A denial of a JMOL was reversed for insufficient evidence, and in both cases the net result is the same — there was insufficient evidence to support a judgment.

DH's reliance on *Christiansen v. Roddy,* 186 Cal.App.3d 780 (1986) and *Kenly v. Ukegawa,* 16 Cal.App.4th 49 (1993) is likewise inapposite. Unlike here, neither *Christiansen* nor *Kenly* involved a jury trial. Both involved court trials, and thus do not trigger the same policy concerns, and, unlike here, neither case involved a jury instruction on damages that went unchallenged both below and on appeal.

3. DH's entire fraud claim fails as a matter of law.

In California, fraud actions are disfavored. *See, e.g., 5 Witkin, California Procedure (4th 1997),* "Pleading," § 669, p. 125.

> "Fraud is a charge that is easily made but less often substantiated. In order to establish a cause of action for fraud a plaintiff must plead and prove in full, factually and specifically, all of the elements of the cause of action." *Conrad v. Bank of America,* 45 Cal.App.4th 133, 156 (1996), *overruled in part on other grounds, Lovejoy v. AT&T Corp.*, 92 Cal.App.4th 85, 94 (2001).

It is well established under California law that damage is an "essential element" of fraud which must be both pleaded and proved or the entire cause of action fails as a matter of law. *Rosenbergv. Lawrence,* 10 Cal.2d 587, 590 (1938); *see also Agnew v. Parks,* 172 Cal.App.2d 756, 768 (1959). Indeed, proof of damage is just as compulsory as any other element to establish fraud liabilty:

> "An action for fraud or deceit...demands proof of damages caused by misrepresentation or concealment of information." *Williams v. Wraxall,* 33 Cal.App.4th 120, 131 (1995); *See also, Zito v. Steeplechase Films, Inc.,* 267 F.Supp.2d 1022, 1027 (N.D.Cal. 2003), *quoting, California Civil Code* § *3333* ["In order to recover on a claim for fraud, the plaintiff must establish the "detriment proximately caused' by the defendant's tortious conduct"]; *Conrad,* 45 Cal.App.4th at 159 ["we find a deficit in proof of the final element of a cause of action for fraud, actual damage resulting from reliance on the defendant's misrepresentation"].

The Court held at page 12 of its opinion that the evidence introduced at trial failed to establish a causal relationship of the evidence (termination of distributors or prior years sales) to damages. Because DH has failed to raise a legitimate new

trial issue or prove an essential element of its claim, the Flora Companies are entitled to judgment in their favor as a matter of law.[2]

C. A partial retrial solely as to damages would be improper.

Generally, a trial or appellate court may grant either a partial or complete new trial if the requisite grounds exist. *See, e.g., F.R.C.P. 59(a); Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 774 (9th Cir. 1981). But the Supreme Court has cautioned that a partial new trial may be granted only if it is clear that it would not deprive a party of its Seventh Amendment right to a fair trial:

> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500, 75 L.Ed. 1188, 51 S.Ct. 513 (1931).

Consistent formulations of this test have been adopted and applied by this Circuit, the Ninth Circuit, and the California Supreme Court. *See, e.g., In re Innotron Diagnostics,* 800 F.2d 1077, 1086 (Fed.Cir. 1986), *quoting, Gasoline Prods.*

---

[2] DH's reliance on *Christiansen* and *Kenly* as permitting a partial retrial on damages in this case is grossly misleading. Both cases involved a court trial, and thus do not even invoke the Seventh Amendment's tight to jury trial. *See Christiansen,* 186 Cal.App.3d at 583; *Kent,* 16 Cal.App.4th at 773. Further, the question here is whether DH is entitled to a new trial based upon what DH contends is an erroneous jury instruction.

Co., 283 U.S. at 500; *Lies*, 641 F.2d at 774, quoting, *Moore's Federal Practice*, ¶ 59.06, at 59-89-91 (2d ed. 1976); *Leipert v. Honold,* 39 Cal.2d 462, 466-467 (1952). Indeed, in this Circuit, separate or partial jury trials cannot be granted, unless "separate trials would not constitute a 'clear and indisputable' infringement of the constitutional right to a fair trial." *In re Innotron,* 800 F.2d at 1086, *quoting, Bankers Life &Cas. Co. v. Holland,* 346 U.S. 379, 384, 98 L.Ed.106, 74 S.Ct. 145 (1953).

The California Supreme Court has repeatedly held that limited retrials should only be granted if there is no doubt regarding their fairness:

> "[E]ven when it appears that the issue of liability was correctly determined, a new trial limited to damages "should be granted...only if it is clear that no injustice will result. [Citations.]...[It] has been held that a request for such a trial should be considered with the utmost caution [citations] and that any doubts should be resolved in favor of granting a complete new trial.'" *Liodas v. Sahadi,* 19 Cal.3d 278, 285-286 (1977), *quoting, Leipert* 39 Cal.2d at 466-467.

Indeed, under California law, it is an abuse of discretion to order a limited retrial if there is any chance prejudice WIU result:

> "'When a limited retrial might be prejudicial to either party, the failure to grant a new trial on all of the issues is an abuse of discretion.'" *Liodas 19* Cal.3d at 286.

The archetypical consututional violation is to grant a partial new trial where "the question of damages...is so

interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Gasoline Prods. Co.*, 283 U.S. at 500. In particular, it is impermissibly prejudicial where a lack of sufficient specificity in the verdict means "[i]t is not possible to determine on what basis liability was predicated." *Liodas*, 19 Cal.3d at 286; *See also, Baxter v. Phillips*, 4 Cal.App.3d 610, 617 (1970).

For example, the Supreme Court held a partial new trial was improper where the verdict did not apportion damages among multiple alleged breaches or specify the extent to which the plaintiff mitigated any of them:

> "The verdict on the counterclaim may be taken to have established the existence of a contract and its breach. Nevertheless, upon the new trial, the jury cannot fix the amount of damages unless also advised of the terms of the contract; and the dates of formation and breach may be material, since it will be open to petitioner to insist upon the duty of respondent to minimize damages." *Gasoline Prods. Co.*, 283 U.S. at 499.

And, under California law, the problem of determining mitigation applies equally to tort causes of action such as fraud:

> "Under the avoidable consequences doctrine as recognized in California, a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure." *State Dept. of Health Services v. Superior Court*, 31 Cal.4th

1026, 1043 (2003) [applying doctrine to sexual harassment claim]; *See also*, *Thrifty-Tel, Inc. v. Bezenek,* 46 Cal.App.4th 1559, 1568 (1996) [applying doctrine of avoidable consequencesto fraud cause of action].

Here, a partial retrial limited solely to damages would result in substantial prejudice to defendants-appellants. DH argued below that the Flora Companies committed at least three separate acts of promissory fraud. *See* Op. at p. 4. However, the jury's verdict does not specify which claim or claims formed the basis of its fraud finding. *See* A21073-21074. Moreover, damages are an essential element of fraud liability, and as a result, damages and liability are inextricably interwoven. Compounding that problem, the jury would also have no basis for determining when the fraudulent promise or promises were made to decide mitigation.

A separate trial on damages would be grossly unfair and prejudicial.

D. Even if a partial retrial were proper, there could be no punitive damages trial against the Flora Companies or Greither.

In phase two of the trial, the jury determined that DH is not entitled to any punitive damages from the Flora Companies. A22404. DH did not appeal from that verdict or the resulting judgment. Thus, DH has waived any argument that it is entided to a retrial on punitive damages. *See Engel 166* F.3d at 1383 ("An issue that falls within the scope of the judgment appealed from but is not raised by appellant in its opening on appeal is necessarily waived.").

The jury also found Greither caused no damages. A21073-21075. Further, the district court precluded DH from seeking punitive damages against him, A21700, and the Court specifically affirmed the district court's ruling. DH offers no reason why the Court should change this decision.

CONCLUSION

For the foregoing reasons, the Flora Companies and Greither respectfully request that the Court deny DH's petition and enter judgment in their favor.

DATED: July 12, 2005 HILL, FARRER & BURRILL

BY: /s/
G. CRESSWELL TEMPLETON III
Attorneys for Defendants-Appellants,
FLORA, INC., FLORA
MANUFACTURING AND
DISTRIBUTING, LTD.,
GABRIEL LIGHTFRIEND, and
THOMAS GREITHER

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal Nos. 03-1438, 03-1439, 03-1440, 03-1441, 03-1442, 03-1443, 03-1457

[Filed July 13, 2005]

DESIGNING HEALTH, INC.,
Plaintiff-Cross-Appellant,

- and -

BERNARD COLLETT and ROBERT MACINTOSH COLLETT,
Plaintiffs/Third-Party Defendants/ Cross-Appellants,

- and -

COLLETT VETERINARY CLINIC, INC. and COLLETT FAMILY TRUST,
Third-Party Defendants-Appellees,

- against -

UDO ERASMUS,
Defendant/Third-Party Plaintiff-Appellant,

- and -)
)
FLORA, INC., FLORA MANUFACTURING)
AND DISTRIBUTING, LTD., THOMAS)
GREITHER and GABRIEL LIGHTFRIEND,)
Defendants-Appellants.)
_____)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA IN CONSOLIDATED CASE NOS. 98-CV-4758 AND 98-CV 9088, JUDGE LOURDES G. BAIRD

OPPOSITION TO PETITION FOR REHEARING

JOHN M. BURNS, III
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CERTIFICATE OF INTEREST

Counsel for Udo Erasmus, an opposing party, hereby certifies the following:

1. The full name of every party or amicus represented by me are:

Udo Erasmus.

2. The name of the real party in interest (if the party named in the caption is not the real party and interest) represented by me is:

Not Applicable

3. All parent companies and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

Not Applicable

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial or agency or are expected to appear in this court are:

John M. Burns, III
33 Greenwich Avenue
New York, New York, 10014
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/s/
John M. Burns, III

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I

PETITIONER IDENTIFIES NO OVERLOOKED OR MISAPPREHENDED POINTS OF LAW OR FACT

II

PETITIONER'S REQUEST FOR CLARIFICATION RESPECTING NEW TRIAL SHOULD BE DENIED

Preliminary Statement

Petitioner's request for "clarification" in the form of "indicating a remand for the district court's determination of a new trial on damages and punitive damages", Petition, p. 15, see pp. 1 ("remanded for a new trial"), 6 ("remands * * * for a new trial"), 8 ("direction for a new trial"), 10 ("directing the district court to consider a new trial"), should be denied because:

A. this Court's June 1, 2005 decision (the "Decision") is not ambiguous;

B. in the absence of a full record for and against new trial, no new trial should be granted; and

C. many post-appeal procedures may be available to the parties; hence, it would be inappropriate to single out new trial and thus elevate it over other procedures which may be available to the parties.

Statement

During and after trial defendants duly moved below for judgment as a matter of law ("JMOL") pursuant to

F.R.Civ.P. Rule 50, *inter alia*, seeking relief from jury damage awards in favor of Designing Health Inc. ("DH") arising out of claims against both defendants for fraud and against Dr. Erasmus alone for breach of fiduciary.

The trial court denied the motions and entered judgment in favor of DH. Defendants appealed.

The papers filed in respect of defendants' motions for JMOL and new trial were not included in the otherwise prolix appendix on this appeal.

Hence, up to the time of its June 1, 2005 decision (the "Decision"), this Court lacked any access to the motion papers respecting defendants motions for JMOL; until its present petition, DH did not seek a new trial respecting damages and still has not stated any grounds for new trial.

The Decision affirmed the trial court's "denial of JMOL with respect to the jury's verdict of liability", reversed denial of JMOL respecting the damage awards and did not remand. The Decision does not explicitly discuss whether the district court may entertain entry of JMOL for defendants or entry of new trial for DH.

Nevertheless, in a June 5, 2005 filing DH represented to the district court that the Decision had vacated "the award of damages and punitive damages for retrial on the damages and punitive damages issues * * *."

On June 23, 2005 a newly assigned district judge scheduled the case for an August 1, 2005 "conference regarding the future of the case", even before the return of this Court's mandate.

Under date of June 27, 2005, DH now petitions this Court for an "admittedly not required" advisory

> "clarifying statement to be added to the DECISION indicating a remand for the district court's determination of a new trial on damages and punitive damages."

Pet., p. 15.

Despite this Court's detailed explanation why the "record evidence does not sufficiently support" the damage awards against defendants, in neither of its two filings, one to the district court and one to this Court, has DH suggested any ground for a new trial of the damages issues, or suggested why new trial would be available under F.R.Civ.P. Rule 59.

Argument

F.R.Civ.P. Rule 50(d) permits a reviewing court, when reversing a judgment, to determine "that the appellee is entitled to a new trial" or direct "the trial court to determine whether a new trial shall be granted". The reviewing court, however, is not required to make any such determination or issue any such directive. *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 323-24, 18 L.Ed.2d 75, 87 S.Ct. 1072 (1967).

A reviewing court may finally decide an issue on appeal when the appeal record is adequate to the task. *E.g.*, *Perkins v. Matthews*, 400 U.S. 379, 386-87, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971); *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1351 (11th Cir.1990).

Hence, this Court concluded in *Exxon Chemical Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475; 1481 (Fed. Cir. 1998) ("Exxon"), that "[I]f the appellee presents the grounds for a new trial in its brief or petition for rehearing," the reviewing court

> "may make final disposition of the issues presented, except those which in its informed discretion should be reserved for the trial court."

Id., *citing* 386 U.S. at 329.

Here, of course, DH has not presented grounds for new trial in its brief or petition. It seems obvious that this Court determined that the record was adequate for this Court to determine whether the evidence was sufficient to support the jury awards of damages but insufficient, at least until DH filed its petition and thereby waived its right to complain of the record available to this Court, to determine whether JMOL should be awarded to defendants or whether DH had grounds for new trial.

Exxon, and *Engel Industries Inc. v. Lockformer Co.*, 166 F.3d 1379 (Fed. Cir. 1999) ("Engel"), read in contrast to *Tronzo v. Biomet, Inc.*, 156 F.3d 1154 (Fed. Cir. 2001), painstakingly explain the meaning of the omission of "remand" after a reversal. *Exxon* and *Engel* both reversed without reference in the decretal paragraph to "remand"[1]; *Tronzo* remanded for a specified purpose. 156 F.3d at 1162.

---

[1] *Exxon* noted in the body of its decision that the reversal was "without remand", 64 F.3d 1553, 1561.

Exxon, explaining *Neely*, *supra*, discussed a class of cases, as here, in which a reviewing court "sets aside a jury's verdict because the evidence was insufficient * * *". The court observed that

> "even in that class of cases, there are some instances in which the plaintiff is entitled to a new trial rather than having a final judgment entered against it."

The use of the word "even" suggests that such instances are rare.

Exxon addressed the significance of its decision not to "remand":

> "As an initial matter, every appellate court judgment vests jurisdiction in the district court to carry out some further proceedings. In some cases, those further proceedings may be purely ministerial, as when a judgment for the plaintiff is reversed and the only matters that remain for the district court are to dismiss the complaint and enter the judgment in the docket. Frequently, however, the disposition of a case in the court of appeals will require the district court to undertake more significant proceedings. In either case, the nature of the district court's remaining tasks is discerned not simply from the language of the judgment, but from the judgment in combination with the accompanying opinion."

(citations omitted) 137 F.3d 1475 at 1483.

Exxon concluded that

> "The exclusion of an explicit remand in the first Exxon opinion was correct as it pertained to the issue on appeal, i.e., literal infringement and the mandate prohibited the district court from granting a new trial on that issue. Read in the light of the accompanying opinion, however, the judgment did not deprive the district court of authority to consider Exxon's motion for a new trial on infringement under the doctrine of equivalents."

137 F.3d at 1484.

Exxon quoted *Neely's* observation that it would be inappropriate for it to "'order judgment n.o.v. ... where the record reveals a new trial issue which has not been resolved.'" 137 F.3d at 1480, *citing* 386 U.S. at 325.

Exxon concluded that *Neely* does "not dictate that an appellate court's mandate must be read to prohibit a district court from granting a new trial unless the appellate court has specifically authorized it to do so." 137 F.3d at 1482, relying on 386 U.S. at 324.

The incompleteness of the record available to this Court on the present appeal left the possibility, although not the probability, of such an issue still unresolved in the present case. Thus, until DH filed its petition and thereby waived complaint to the adequacy of the record, it was more appropriate for the trial court to resolve the question of entering JMOL in the first instance. The Decision limits its remedy to reversal of denial of JMOL respecting the awards of damages against defendants and thus preserved the inherent fairness of the procedure.

In *Engel*, this Court explained the meaning of its earlier decision not to remand after reversing-in-part, stating

> "[u]nless remanded by this court, all issues within the scope of the appealed judgment are deemed incorporated within the mandate and thus are precluded from further adjudication",

(citations omitted) 166 F.3d 1383, explaining that

> "the scope of the * * * mandate, and thus the scope of the matters removed from the District Court's jurisdiction, is coterminous with the scope of the issues deemed presented to the court on appeal."

166 F.3d at 1382, citing *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161,168, 83 L.Ed. 1184, 59 S.Ct. 777 (1939)("While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues.").

The issues "precluded from further adjudication" include issues "decided by necessary implication" (citation omitted), *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 951 (Fed. Cir. 1997) as well as those decided explicitly. Moreover, decisions by the lower court respecting remaining issues "should not be inconsistent with either the letter or the spirit of the mandate." (Citation omitted) *Id.*

Thus, *Exxon* provided an apt roadmap to for the trial court to follow in this case: "the primary question in this case, as in all such cases, is what the appellate court's mandate left for the district court to do." 137 F.3d at 1482.

In the Decision this Court clearly followed *Exxon* and *Engel* to preclude continued adjudication on the award of

damages. After detailing the manner in which the "record evidence does not sufficiently support" the damage awards against defendants, this Court reversed "the District Court's denial of JMOL" as to the damage awards against defendants for fraud and breach of fiduciary duty and did not remand.

The analogy of *Engel* to the present case is striking. Here, after reviewing the lengthy trial transcript, this Court presciently ruled that the evidence presented by DH at trial does not support the award of damages. The district court may not now tinker with that issue. Should DH find cognizable grounds under these circumstances for a new trial on damages, the district court may consider such grounds on DH's motion.

We are not as cynical as DH about the new judge's ability to read this Court's Decision. We assume that this Court directed its attention to the possibility of going further to resolve the issues of this case, *Neely*, 386 U.S. at 329-30, but concluded that it would be improvident on the state of the record before the present petition was filed either (a) to grant JMOL in favor of defendants because this Court lacked access to the full record of defendants' motions for JMOL or (b) to grant, or enter a directive respecting, a new trial in the absence of access to any grounds for or opposition to a motion for new trial in DH's interest.

This Court should not issue some kind of directive which could be misinterpreted as suggesting that DH's failure to present its evidence at the time of trial, more than four years after DH commenced this action, now can be easily excused.

III

AUTHORITIES CITED IN THE DECISION DO NOT SUPPORT REMAND FOR NEW TRIAL

Even were federal courts bound by state procedure, *Christiansen v. Roddy*, 186 Cal.App.3d 780, 231 Cal.Rptr. 72 (5th Distr. 1986). and *Kenly v. Ukegawa*, 16 Cal.App.4th 49, 10 Cal.Rptr.2d 774 (4th Distr. 1993), would not suggest a remand in the present case for a new trial respecting damages.

Here, after careful analysis this Court dismissed the award of damages for failure to be supported by sufficient evidence and carefully struck the balance described in Point II, *supra*, between what this Court held established by that failure in the context of the appeal and what remained for the trial court to consider.

DH makes no effort in its petition here to point to any evidence that would have supported a claim of damages.

In *Christiansen* the reviewing court held, as did the trial court, that interest lost due to the fraud should be awarded; the reviewing court disagreed with the trial court respecting the manner of calculating the lost interest.

In *Kenly* the defendants appear to have contested only "the propriety of the amount of compensatory damages", 16 Cal.App.4th at 51, 10 Cal.Rptr.2d at 772. The reviewing court returned the case "for retrial solely on the issues of the proper amounts of compensatory and punitive damages * * * ."

Christiansen and *Kenly* involve exactly the same category of issues sent back for redetermination by the lower court in *Tronzo*, *supra*, 156 F.3d at 1162 "appropriate award of damages"). The fact that here this Court followed the *Exxon/Engel* route instead of the *Tronzo* route confirms that this Court intended that damages here should not be redetermined by the lower court.

Here, defendants broadly contest the sufficiency of the evidence, especially the evidence to support the amount of the damages. Insufficiency of evidence entails a failure of proof, raising entirely different issues respecting future proceedings than are raised by consideration of the propriety of the calculation of the damages.

IV

NO EVIDENTIARY RULING OF THIS COURT ENTITLES DH TO NEW TRIAL

Contrary to the premise of Designing Health's Point IV, inadmissibility of summary evidence is not the thrust of this Court's reversal of the district court's denial of JMOL as to the fiduciary duty damages award. Admissibility was not the issue that led to the reversal of the fiduciary duty damage award here. Indeed, this Court held that it "could not say that the district court abused its discretion in admitting" the summary exhibit which listed the bulk of the claimed damages. Decision, p. 14.

Instead, this Court based this reversal on its conclusion that the evidence presented was "insufficient as a matter of law" because of the absence of evidence "why all of the costs of promoting DH's health supplement products in connection with Erasmus constitute economic losses" to DH and why

"payments made to Dr. Erasmus as a director and manager of DH constitute economic losses resulting from Erasmus's breach of fiduciary duty." Decision, pp. 14-15.

Paddack v. Dave Christensen, Inc., 745 F.2d 1254 (9th Cir. 1984), upon which DH here relies, is irrelevant to that conclusion. *Paddack* observed that the trial court there had properly held audit reports and their summaries inadmissible as hearsay but held that the trial court, conducting a bench trial, may have failed to use the audits "for the limited purpose of explaining the basis of the expert's testimony under Rule 703." 745 F.2d at 1256, 1263. The reviewing court remanded "for a redetermination of the existence and scope of the Employer's liability in light of a proper understanding of the applicable Federal Rules of Evidence." 745 F.2d at 1263.

No exclusion of evidence as occurred in *Paddack* justifies a remand of the present action for new trial.

V & VI

BENEFIT-OF-THE-BARGAIN DAMAGES ARE NOT AVAILABLE TO DH

DH's claims of fraud against defendants were presented to the jury with a jury instruction which listed the permitted methods of calculating damages for fraud but which did not list benefit-of-the-bargain damages. 22728, 31022-23. DH's claim of breach of fiduciary duty against Dr. Erasmus was presented to the jury with a jury instruction which also listed the permitted methods of calculating damages for breach of fiduciary duty but which did not list benefit-of-the-bargain damages. A22713, 31015.

DH did not object to either of the listings presented; nor did DH request any instruction respecting benefit-of-the-bargain damages A30944-0992, 30997-0999.[2] DH offers no excuse why it did not request or object on this basis at the time of the instructions. Moreover, DH did not raise any deficiency in the jury instructions on this appeal. Accordingly, DH's new argument for benefit-of-the-bargain damages was waived at both the trial and the appeal levels.

This Court held that "the evidence presented by DH in support of the fraud damages award is insufficient as a matter of law" on two separate, independent grounds: (a) "under California law, DH is not entitled to recover benefit-of-the-bargain damages" and (b) "DH has failed to establish lost profits with reasonable certainty." Decision, p. 14.

Were DH entitled to benefit-of-the-bargain damages and had DH not twice waived any right to such calculation of damages in the course of settling jury instructions, DH's failure even now to attempt articulation of such damages forestalls further attention to the issue. Decision, p. 12, was correct, appears as an academic discussion instead of an argument for clarification.

CONCLUSION

Before DH filed its petition and thereby waived any complaint about the adequacy of the record, it was prudent for this Court not to remand or otherwise comment on post-trial issues relating to JMOL or new trial. DH identifies no

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[2] In its Opening Brief, p. 70, DH claimed to have "proposed [a] correct instruction" but its appendix citations do not support that claim.

overlooked or misapprehended points of law or fact. The Decision is unambiguous. Having failed to make its proofs without excuse, this case does not appear as one in which new trial is customarily granted to a plaintiff. No exclusion of evidence here entitles DH to a new trial. Benefit-of-the-bargain damages were both waived and not proved at the time of the trial. Accordingly, DH's request for clarification or new trial respecting damages should be denied.

Respectfully submitted,

Dated: July 13, 2005

/s/_____

John Burns, III
Attorney for Defendant/Third Party
Plaintiff-Appellant, Udo Erasmus

APPENDIX J

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Nos. 03-1438, -1439, -1440, -1441, -1442, -1443
(DCT 98-CV-4758)

[Filed August 3, 2005]

DESIGNING HEALTH, INC.,
Plaintiffss-Cross Appellant,

and

BERNARD COLLETT and ROBERT MACINTOSH COLLETT,
Plaintiffs/Third Party Defendants-Cross Appellants,

and

COLLETT VETERINARY CLINIC, INC. and COLLETT FAMILY TRUST
Third Party Defendants-Appellees,

V.

UDO ERASMUS,
Defendant/Third Party Plaintiff-Appellant,

and

FLORA, INC., FLORA MANUFACTURING AND DISTRIBUTING, LTD., and THOMAS GREITHER,
Defendants-Appellants,

and

GABRIEL LIGHTFRIEND,
Defendant.

ORDER

Before LOURIE, Circuit Judge, CLEVENGER, Circuit Judge, and SCHALL, Circuit Judge.

A petition for rehearing having been filed by the CROSS-APPELLANTS, and responses thereto having been invited by the court and filed by the APPELLANTS,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on August 10, 2005.

FOR THE COURT,

/s/
Jan Horbaly
Clerk

Dated: August 3, 2005

cc: G. C. Templeton III, John M. Burns III, Allen Hyman

APPENDIX K

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO.CV 98-4758

[Filed October 30, 2002]

DESIGNING HEALTH, INC., a Colorado corporation, et al., Plaintiffs,	)
v.	)
UDO ERASMUS, et al., Defendants.	)
AND RELATED CLAIMS	)

SPECIAL VERDICT FORMS

We, the jury, unanimously find as follows:

BREACH OF FIDUCIARY DUTY

SPECIAL VERDICT FORM 1

Step 1. Do you find by a preponderance of the evidence that Udo Erasmus breached a fiduciary duty owed to

Designing Health arising out of membership on Designing Health's board of directors?

YES ✓ NO ____

If your answer to this question is "YES," then proceed to Step 2. If your answer to this question is "NO," then go to Special Verdict Form 2.

Step 2. What amount of damages, if any, were caused by the breach of fiduciary duty by Udo Erasmus?

$ 700,000

Step 3. Do you find by clear and convincing evidence that there was oppression, malice, or fraud in Udo Erasmus's conduct on which you base your findings of liability as to breach of fiduciary duty?

YES ✓ NO ____

Go on to Special Verdict Form 2.

FRAUD

SPECIAL VERDICT FORM 2

Step 1. Do you find by a preponderance of the evidence that Udo Erasmus, Flora, Inc., Flora, Ltd., Thomas Greither, or Gabriel Lightfriend committed fraud based upon intentional misrepresentation or false promises against Designing Health?

As to Udo Erasmus?
YES ✓ NO ____

As to Flora, Inc.?
YES ✓ NO ____

As to Flora, Ltd.?
YES ✓ NO ____

As to Thomas Greither?
YES ✓ NO ____

As to Gabriel Lightfriend?
YES ✓ NO ____

If your answer to this question is "YES" as to any party, then proceed to Step 2. If your answer to this question is "NO" as to any party, then skip Step 2 and Step 3 as to that party only. If your answer to this question is "NO" as to all parties, then go to Special Verdict Form 3.

Step 2. What amount of damages, if any, were caused by fraud by Udo Erasmus against Designing Health?

$ 85,000

What amount of damages, if any, were caused by fraud by Flora, Inc. against Designing Health?

$ 640,000

What amount of damages, if any, were caused by fraud by Flora, Ltd. against Designing Health?

$ 640,000

What amount of damages, if any, were caused by fraud by Thomas Greither against Designing Health?

$ 0

What amount of damages, if any, were caused by fraud by Gabriel Lightfriend against Designing Health?

$ _____

Step 3. Do you find by clear and convincing evidence that there was oppression, malice, or fraud in Udo Erasmus's conduct on which you base your findings of liability as to fraud against Designing Health?

YES ✓ NO ____

Do you find by clear and convincing evidence that there was oppression, malice, or fraud in Flora Inc.'s conduct on which you base your findings of liability as to fraud against Designing Health?

YES ✓ NO ____

Do you find by clear and convincing evidence that there was oppression, malice, or fraud in Flora Ltd.'s conduct on which you base your findings of liability as to fraud against Designing Health?

YES ✓ NO ____

Do you find by clear and convincing evidence that there was oppression, malice, or fraud in Thomas Greither's conduct on which you base your findings of liability as to fraud against Designing Health?

YES ✓ NO ____

Do you find by clear and convincing evidence that there was oppression, malice, or fraud in Gabriel Lightfriend's conduct on which you base your findings of liability as to fraud against Designing Health?

YES ____ NO ____

Go on to Special Verdict Form 3.

SPECIAL VERDICT FORM 3

Step 1. Do you find by a preponderance of the evidence that Designing Health, Robert Collett, Bernard Collett, the Collett Veterinary Clinic, or the Collett Family Trust committed fraud based upon intentional misrepresentation or concealment against Udo Erasmus?

As to Designing Health?
YES ____ NO ✓

As to Robert Collett?
YES ____ NO ✓

As to Bernard Collett?
YES ____ NO ✓

As to the Collett Veterinary Clinic?
YES ____ NO ✓

As to the Collett Family Trust?
YES ____ NO ✓

If your answer to this question is "YES" as to any party, then proceed to Step 2. If your answer to this question is "NO" as to any party, then skip Step 2 and Step 3 as to that

party only. If your answer to this question is "NO" as to all parties, then go to Special Verdict Form 4.

Step 2. What amount of damages, if any, were caused by fraud by Designing Health against Udo Erasmus?

$ ____

What amount of damages, if any, were caused by fraud by Robert Collett against Udo Erasmus?

$ ____

What amount of damages, if any, were caused by fraud by Bernard Collett against Udo Erasmus?

$ ____

What amount of damages, if any, were caused by fraud by the Collett Veterinary Clinic against Udo Erasmus?

$ ____

What amount of damages, if any, were caused by fraud by the Collett Family Trust against Udo Erasmus?

$ ____

Step 3. Do you find by clear and convincing evidence that there was oppression, malice, or fraud in Designing Health's conduct on which you base your findings of liability as to fraud against Udo Erasmus?

YES ____ NO ____

Do you find by clear and convincing evidence that there was oppression, malice, or fraud in Robert Collett's conduct on which you base your findings of liability as to fraud against Udo Erasmus?

YES ____ NO ____

Do you find by clear and convincing evidence that there was oppression, malice, or fraud in Bernard Collett's conduct on which you base your findings of liability as to fraud against Udo Erasmus?

YES ____ NO ____

Do you find by clear and convincing evidence that there was oppression, malice, or fraud in the Collett Veterinary Clinic's conduct on which you base your findings of liability as to fraud against Udo Erasmus?

YES ____ NO ____

Do you find by clear and convincing evidence that there was oppression, malice, or fraud in the Collett Family Trust's conduct on which you base your findings of liability as to fraud against Udo Erasmus?

YES ____ NO ____

Go on to Special Verdict Form 4.

SPECIAL VERDICT FORM 4

Step 1. Do you find by a preponderance of the evidence that Designing Health or Bernard Collett committed fraud

based upon intentional misrepresentation or false promise against the Flora Parties?

As to Designing Health?
YES ____ NO ___✓___

As to Bernard Collett?
YES ____ NO ___✓___

If your answer to this question is "YES" as to any party, then proceed to Step 2. If your answer to this question is "NO" as to any party, then skip Step 2 and Step 3 as to that party only. If your answer to this question is "NO" as to all parties, then go to Special Verdict Form 5.

Step 2. What amount of damages, if any, were caused by fraud by Designing Health against the Flora Parties?

$ ____

What amount of damages, if any, were caused by fraud by Bernard Collett against the Flora Parties?

$ ____

Step 3. Do you find by clear and convincing evidence that there was oppression, malice, or fraud in Designing Health's conduct on which you base your findings of liability as to fraud against the Flora Parties?

YES ____ NO ____

Do you find by clear and convincing evidence that there was oppression, malice, or fraud in Bernard Collett's conduct

on which you base your findings of liability as to fraud against the Flora Parties?

YES ____ NO ____

Go on to Special Verdict Form 5.

NEGLIGENT MISREPRESENTATION

Special Verdict Form 5.

Step 1. Do you find by a preponderance of the evidence that Designing Health or Bernard Collett committed negligent misrepresentation against the Flora Parties?

As to Designing Health?
YES ✓ NO ____

As to Bernard Collett?
YES ____ NO ✓

If your answer to this question is "YES" as to any party, then proceed to Step 2. If your answer to this question is "NO" as to any party, then skip Step 2 as to that party only. If your answer to this question is "NO" as to all parties, then go to Special Verdict Form 6.

Step 2. What amount of damages, if any, were caused by negligent misrepresentation by Designing Health against the Flora Parties?

$ 70,000

What amount of damages, if any, were caused by negligent misrepresentation by Bernard Collett against the Flora Parties?

$ _____

Go to Special Verdict Form 6.

UNFAIR COMPETITION

SPECIAL VERDICT FORM 6

Step 1. Do you find by a preponderance of the evidence that Udo Erasmus, Flora Inc., Flora Ltd., Thomas Greither or Gabriel Lightfriend committed unfair competition by trade dress infringement against Designing Health?

As to Udo Erasmus?
YES ____ NO ✓

As to Flora Inc.?
YES ____ NO ✓

As to Flora Ltd.?
YES ____ NO ✓

As to Thomas Greither?
YES ____ NO ✓

As to Gabriel Lightfriend?
YES ____ NO ✓

If your answer to this question is "YES" as to any party, then proceed to Step 2. If your answer to this question is "NO" as to any party, then skip Step 2 as to that party only.

If your answer to this question is "NO" as to all parties, then go to Special Verdict Form 7.

Step 2. What amount of damages, if any, were caused by unfair competition by Udo Erasmus against Designing Health?

$ _____

What amount of damages, if any, were caused by unfair competition by Flora, Inc. against Designing Health?

$ _____

What amount of damages, if any, were caused by unfair competition by Flora, Ltd. against Designing Health?

$ _____

What amount of damages, if any, were caused by unfair competition by Thomas Greither against Designing Health?

$ _____

What amount of damages, if any, were caused by unfair competition by Gabriel Lightfriend against Designing Health?

$ _____

Go on to Special Verdict Form 7.

CONSPIRACY

SPECIAL VERDICT FORM 7

Do you find by a preponderance of the evidence that Udo Erasmus, Flora Inc., Flora Ltd., Thomas Greither, or Gabriel Lightfriend are liable for conspiracy to commit fraud against Designing Health?

As to Udo Erasmus?
YES ✓ NO ____

As to Flora Inc.?
YES ✓ NO ____

As to Flora Ltd.?
YES ✓ NO ____

As to Thomas Greither?
YES ✓ NO ____

As to Gabriel Lightfriend?
YES ____ NO ✓

Go on to Special Verdict Form 8.

SPECIAL VERDICT FORM 8

Do you find by a preponderance of the evidence that Udo Erasmus, Flora Inc., Flora Ltd., Thomas Greither, or Gabriel Lightfriend are liable for conspiracy to commit unfair competition against Designing Health?

As to Udo Erasmus?
YES ✓ NO ____

As to Flora Inc.?
YES ✓ NO ____

As to Flora Ltd.?
YES ✓ NO ____

As to Thomas Greither?
YES ✓ NO ____

As to Gabriel Lightfriend?
YES ✓ NO ____

Go on to Special Verdict Form 9.

BREACH OF CONTRACT

SPECIAL VERDICT FORM 9

Step 1. Do you find by a preponderance of the evidence that Designing Health breached a contract with the Flora Parties?

YES ✓ NO ____

If your answer to this question is "YES,", then proceed to Step 2. If your answer to this question is "NO," then skip Step 2 and go to Special Verdict Form 10.

Step 2. What amount of damages, if any, were caused by breach of contract by Designing Health against the Flora Parties?

$ 100,000

Go on to Special Verdict Form 10.

SPECIAL VERDICT FORM 10

Step 1. Do you find by a preponderance of the evidence that Designing Health, Robert Collett, Bernard Collett, the Collett Veterinary Clinic, or the Collett Family Trust breached a contract with Udo Erasmus?

As to Designing Health?
YES ____ NO ✓

As to Robert Collett?
YES ____ NO ✓

As to Bernard Collett?
YES ____ NO ✓

As to the Collett Veterinary Clinic?
YES ____ NO ✓

As to the Collett Family Trust?
YES ____ NO ✓

If your answer to this question is "YES" as to any party, then proceed to Step 2. If your answer to this question is "NO" as to any party, then skip Step 2 as to that party only. If your answer to this question is "NO" as to all parties, then go to Special Verdict Form 11.

Step 2. What amount of damages, if any, were caused by breach of contract by Designing Health against Udo Erasmus?

$ ____

What amount of damages, if any, were caused by breach of contract by Robert Collett against Udo Erasmus?

$ ____

What amount of damages, if any, were caused by breach of contract by Bernard Collett against Udo Erasmus?

$ ____

What amount of damages, if any, were caused by breach of contract by the Collett Veterinary Clinic against Udo Erasmus?

$ ____

What amount of damages, if any, were caused by breach of contract by the Collett Family Trust against Udo Erasmus?

$ ____

Go on to Special Verdict Form 11.

ESTOPPEL TO DENY

SPECIAL VERDICT FORM 11

If you answered "YES" to Special Verdict Form 9, skip this question and go on to Special Verdict Form 12.

If you answered "NO" to Special Verdict Form 9, proceed to Step 1.

Step 1. Do you find by a preponderance of the evidence that the Flora Parties should prevail on their claim against Designing Health for estoppel to deny contract?

YES ____ NO ____

If your answer to this question is "YES," then proceed to Step 2. If your answer to this question is "NO," then skip Step 2 and proceed to Special Verdict Form 12.

Step 2. What amount of damages, if any, are the Flora Parties entitled to on their claim for estoppel to deny contract against Designing Health?

$ ____

Go on to Special Verdict Form 12.

UNJUST ENRICHMENT

SPECIAL VERDICT FORM 12

Step 1. Do you find by a preponderance of the evidence that Udo Erasmus should prevail on his claim against Designing Health, Robert Collett, Bernard Collett, the Collett Veterinary Clinic, or the Collett Family Trust for unjust enrichment?

As to Designing Health?
YES ____ NO ✓

As to Robert Collett?
YES ____ NO ✓

As to Bernard Collett?
YES ____ NO ✓

As to the Collett Veterinary Clinic?
YES ____ NO ✓

As to the Collett Family Trust?

YES ____ NO ✓

If your answer to this question is "YES" as to any party, then proceed to Step 2. If your answer to this question is "NO" as to any party, then skip Step 2 as to that party only. If your answer to this question is "NO" as to all parties, please sign, date, and return the Special Verdict Form.

Step 2. What amount of damages, if any, do you award to Udo Erasmus on his claim of unjust enrichment against Designing Health?

$ ____

What amount of damages, if any, do you award to Udo Erasmus on his claim of unjust enrichment against Robert Collett against Udo Erasmus?

$ ____

What amount of damages, if any, do you award to Udo Erasmus on his claim of unjust enrichment against Bernard Collett?

$ ____

What amount of damages, if any, do you award to Udo Erasmus on his claim of unjust enrichment against the Collett Veterinary Clinic?

$ ____

What amount of damages, if any, do you award to Udo Erasmus on his claim of unjust enrichment against the Collett Family Trust?

$ ____

You are finished. Please sign, date, and return the Special Verdict Form.

Dated: 10/30/02 /s/ _____
ForePerson

APPENDIX L

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No.: CV 98-4758 LGB (Cwx)

Date: February 13, 2003

Title: Designing Health, et al. v. Udo Erasmus, et al.

DOCKET ENTRY

PRESENT: Hon. Lourdes G. Baird, United States District Judge

Catherine Jeang	None Present
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

None Present

ATTORNEYS PRESENT FOR DEFENDANTS:

None Present

PROCEEDINGS: In Chambers

The Court is in receipt of the parties' post-trial briefs filed pursuant to the Court's minute order of November 12, 2002. The Court has concluded, pursuant to Federal Rule of Civil Procedure 78 and Local Rule 7-15, that no oral argument is necessary, and the Court will decide the pending matters on the basis of the papers submitted.

First, the Court requested briefing as to Defendant Udo Erasmus' counterclaim for declaratory relief regarding ownership of the trade name "Designing Health." *See* Court's Minute Order (11/12/02), ¶ 4. Second, the Court requested briefing as to the legal effect on liability or damages of a finding of civil conspiracy. *See id.* ¶ 5. Specifically, the Court instructed the parties to answer the question: "What is the legal effect of a conspiracy finding (1) against all defendants as to unfair competition and (2) against Defendants Erasmus, Flora, Inc., Flora, Ltd., and Thomas Greither as to fraud?" *Id.* Finally, the Court found that the briefing on the parties' motions for judgment as a matter of law ("JMOL") was insufficient. *See id.*

¶ 6. The Court thus struck all briefing and requested new briefs as to five JMOL motions: (1) Defendant Flora Parties'[1] JMOL motion regarding fraud; (2) Defendant Erasmus' JMOL motion regarding fraud; (3) Defendant Erasmus' JMOL motion regarding breach of fiduciary duty; (4) Plaintiffs' JMOL motion regarding breach of contract; and (5) Plaintiffs' JMOL motion regarding negligent misrepresentation.

---

[1] The Flora Parties include Defendants Flora, Inc., Flora, Ltd., Thomas Greither, and Gabriel Lightfriend.

The Court has received all briefing on the above issues and now rules as follows:

(1) As to Defendant Erasmus' counterclaim for declaratory relief regarding ownership of the trade name "Designing Health," the Court declines to issue such declaratory relief. Defendant Erasmus did not present sufficient evidence at trial that he owned the trade name prior to October 1995, when Plaintiff Designing Health, Inc., adopted the name. Plaintiffs correctly argued that Defendant Erasmus did not demonstrate that he owned the trade name, because there was insufficient evidence that he was the first to use it in commerce in the United States.

Priority of trademark rights depends on priority of use. 2 McCarthy on Trademarks § 16:1. Further, priority of trademark rights in the United States depends solely on priority of use in the United States, not on prior use in another country. *Id.* § 29:2. The totality of a party's prior actions, taken together, determine whether it has established a priority right to use the term. *New West Corp. v. NYM Co. of Cal.*, 595 F.2d 1194, 1200 (9th Cir. 1979). Factors to consider in determining priority of use include (1) which party first developed and affixed the mark to its goods; (2) which party's name first appeared in connection with the goods; (3) which party has maintained the quality and uniformity of the products; (4) with which party does the public identify the goods; and (5) which party has the goodwill associated with the goods. *Stephen W. Boney, Inc. v. Boney Services, Inc.*, 127 F.3d 821, 829 (9th Cir. 1997).

The evidence presented by Defendant Erasmus to support this counterclaim does not support a finding that Defendant Erasmus had priority of use over the trade name "Designing Health," because there is no evidence that the name was used

in commerce in the United States prior to October 1995. Therefore, the Court **DENIES** this counterclaim.

(2) The Court requested briefing on the effect of the jury's verdict as to conspiracy (Special Verdict ("SV") Forms 7 [re: fraud], 8 [re: unfair competition]). Defendants' briefs addressed issues not requested by the Court; however, the Court declines Plaintiffs' request to strike the briefs.

Conspiracy is not a cause of action, but a legal doctrine that imposes liability on those who, although not committing a tort themselves, effectively adopt the torts of the other co-conspirators. *Allied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-11 (1994). In this way, a co-conspirator incurs tort liability co-equal with the immediate tortfeasors. *Id.* at 511.

The jury concluded the following regarding tort liability: Defendants Udo Erasmus, Flora, Inc., Flora, Ltd., and Thomas Greither were found liable for fraud. *See* SV Form 2. No Defendant was found liable for unfair competition. *See* SV Form 6.

(a) As to the fraud conspiracy: In SV Form 7, the jury concluded that Defendant Flora, Inc., Flora Ltd., Udo Erasmus, and Thomas Greither were liable for conspiracy to commit fraud. The Court concludes that the effect of this verdict is as follows:

(i) Flora, Ltd. and Udo Erasmus are jointly and severally liable together with Flora, Inc. for damages awarded against Flora, Inc. for fraud ($640,000).[2]

(ii) Flora, Inc. and Udo Erasmus are jointly and severally liable together with Flora, Ltd. for damages awarded against Flora, Ltd. for fraud ($640,000).

(iii) Flora, Inc., Flora, Ltd., and Thomas Greither are jointly and severally liable together with Udo Erasmus for damages awarded against Udo Erasmus for fraud ($85,000).

(b) As to the unfair competition conspiracy: In SV Form 8, the jury concluded that Defendants Flora, Inc., Flora, Ltd., Udo Erasmus, Thomas Greither, and Gabriel Lightfriend were liable for conspiracy to commit unfair competition. However, the jury also concluded, in SV Form 6, that no defendant was liable for the tort of unfair competition. Standing alone, a conspiracy does no harm and engenders no tort liability; it must be activated by the commission of an actual tort. *Allied*, 7 Cal. 4th at 511. The Court concludes that since the jury found no tort liability against any defendant for unfair competition in SV Form 6,

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[2] The parties agree that Thomas Greither is not jointly and severally liable for damages incurred by Flora, Inc. and Flora Ltd., based on the rule that Thomas Greither, as an agent or employee of the Flora Companies, may not legally conspire with his corporate principal or employer. *See Black v. Bank of America*, 30 Cal. App. 4th 1, 4 (1994) (discussing the agent's immunity rule and stating that "[a]gents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage").

the jury's finding in SV Form 8 has no effect and engenders no tort liability.

(3) Finally the Court considers the motions for JMOL. The legal standard for a JMOL motion is set forth in Federal Rule of Civil Procedure 50: A JMOL motion should be granted where "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). Where the Court concludes there is any legally sufficient evidentiary basis for the jury's finding, the Court may not grant a motion for JMOL.

(a) **Defendant Flora Parties' JMOL motion regarding fraud**. The Court concludes that Plaintiffs presented a sufficient evidentiary basis for a jury to conclude that the Flora Parties[3] are liable for fraud. In addition, the Court concludes that Plaintiffs presented sufficient evidence to support damages in the amount $640,000 as to each Flora company. Finally, the Court concludes that Plaintiffs presented sufficient evidence to support a finding of conspiracy involving Flora, Inc., Flora Ltd., Udo Erasmus, and Thomas Greither[4] based on fraud. Therefore, Defendant Flora Parties' JMOL motion regarding fraud is DENIED.

(b) **Defendant Erasmus' JMOL motion regarding fraud**. The Court concludes that Plaintiffs presented a sufficient evidentiary basis for a jury to conclude that Udo Erasmus was liable for fraud. In addition, the Court concludes

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[3] The jury concluded that Gabriel Lightfriend was not liable for fraud.

[4] Although Thomas Greither could not legally conspire with Flora, Inc. and Flora, Ltd., as discussed in footnote 1, a jury could conclude that he conspired with Udo Erasmus.

that Plaintiffs presented sufficient evidence to support damages against Defendant Erasmus in the amount of $85,000. Finally, as stated in connection with Defendant Flora Parties' JMOL motion regarding fraud, the Court concludes that Plaintiffs presented sufficient evidence to support a finding of conspiracy involving Flora, Inc., Flora, Ltd., Udo Erasmus, and Thomas Greither based on fraud. Therefore, Defendant Udo Erasmus' JMOL motion regarding fraud is DENIED.

(c) **Defendant Erasmus' JMOL motion regarding breach of fiduciary duty**. The Court concludes that Plaintiffs presented a sufficient evidentiary basis for a jury to conclude that Udo Erasmus was liable for breach of fiduciary duty. In addition, the Court concludes that Plaintiffs presented sufficient evidence to support damages against Defendant Erasmus on this claim in the amount of $700,000. Therefore, Defendant Udo Erasmus' JMOL motion regarding breach of fiduciary duty is DENIED.

(d) **Plaintiffs' JMOL motions regarding breach of contract and negligent misrepresentation**. The Court concludes that Defendant Flora Parties presented a sufficient evidentiary basis for a jury to conclude that Plaintiffs were liable for breach of contract and negligent misrepresentation. In addition, the Court concludes that the Flora Parties presented sufficient evidence to support damages against Defendant Erasmus in the amount of $70,000 on the negligent misrepresentation counterclaim and $100,000 on the breach of contract counterclaim. Finally, the Court concludes that these damage awards are not duplicative. Therefore, Plaintiffs' JMOL motions regarding breach of contract and negligent misrepresentation are DENIED.

Based on the foregoing:

(1) Defendant Erasmus' third counterclaim for declaratory relief regarding ownership of the trade name "Designing Health" is **DENIED**.

(2) Regarding the conspiracy findings:

(a) Based on Special Verdict Form 7, the Court **ORDERS** that

(i) Flora, Inc., Flora, Ltd., and Udo Erasmus are jointly and severally liable for damages awarded against Flora, Inc. for fraud ($640,000);

(ii) Flora, Inc., Flora, Ltd., and Udo Erasmus are jointly and severally liable for damages awarded against Flora, Ltd. for fraud ($640,000); and

(iii) Flora, Inc., Flora, Ltd., Udo Erasmus, and Thomas Greither are jointly and severally liable for damages awarded against Udo Erasmus for fraud ($85,000).

(b) The Court finds that Special Verdict Form 8 has no effect and engenders no tort liability.

(3) Regarding the motions for JMOL:

(a) Defendant Flora Parties' JMOL motion regarding fraud is **DENIED**.

(b) Defendant Erasmus' JMOL motion regarding fraud is **DENIED**.

(c) Defendant Erasmus' JMOL motion regarding breach of fiduciary duty is **DENIED**.

(d) Plaintiffs' JMOL motions regarding breach of contract and negligent misrepresentation are **DENIED**.

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FAX DELIVERY ON PLAINTIFF/DEFENDANT (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT FAX NUMBER OF RECORD IN THIS ACTION ON THIS DATE.

Deputy Clerk cmj

DATE FEB 13 2003

/s/ Catherine M. Jeang
DEPUTY CLERK

APPENDIX M

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 98-4758 LGB (CWx) 98-9088 (CWx)

[Filed November 13, 2002]

DESIGNING HEALTH, INC., a Colorado corporation, et al.,
Plaintiffs,

v.

UDO ERASMUS, an individual, et al.,
Defendants.

AND RELATED CLAIMS.

SPECIAL VERDICT FORM - PUNITIVE DAMAGES

We, the jury in the above-entitled action, find the following punitive damages:

Udo Eramus	$47,144
Flora, Inc.	$0.00
Flora, Ltd.	$0.00

Please sign, date, and return the Special Verdict Form.

Dated: 11/13/02 /s/ _____
Foreperson

APPENDIX N

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 98-4758 LGB (CWx)

[Filed October 22, 2002]

CIVIL MINUTES - GENERAL

Case No: CV 98-4758 (CWx)

Date: October 22, 2002

Title: Designing Health, et al. v. Udo Erasmus, et al.

DOCKET ENTRY

PRESENT: Hon. Lourdes G. Baird, United States District Judge

Catherine Jeang	None Present
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
None Present

ATTORNEYS PRESENT FOR DEFENDANTS:
None Present

PROCEEDINGS: In Chambers

The Court is in receipt of Plaintiffs' Listing of Summary Exhibits Designing Health Wishes to Have Admitted into Evidence, filed October 17, 2002; The Flora Parties' Objections to Plaintiffs' Exhibits, filed October 18, 2002; Dr. Erasmus' Objections to Certain Exhibits Offered by Plaintiffs, filed October 18, 2002; and Plaintiffs' Statement of Designing Health as to the Relevance of the Summary Exhibits, filed October 21, 2002.

The Court ORDERS that the following exhibits are ADMITTED: 13010A, 13010B, 16000-9, 16000-10, 16000-11, 16000-12, 16000-13, 14246A, 15000-1, 15000-2, 15000-3, 15000-4, 140002-1, 14002-2, 14002-3, 14002-4, and 14002-5.

The objection to Ex. 17010 is SUSTAINED based on lack of foundation. The objection to Ex. 17011 is SUSTAINED based on lack of foundation. The objections to Exs. 14001A-44001C, and 14001D are SUSTAINED based on lack of foundation.

Deputy Clerk _____

APPENDIX O

ALLEN HYMAN, ESQ. (73371)
CHRISTINE COVERDALE, ESQ. (SBN: 195635)
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Attorneys for Plaintiffs and Counterdefendants,
DESIGNING HEALTH, INC.,
DR. ROBERT COLLETT, and BERNARD COLLETT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NOS. CV 98-4758 GPS (CWx)

SECOND DECLARATION OF ALLEN HYMAN INDICATING PROCEEDINGS THAT OCCURRED IN THE TRIAL OF OCTOBER, 2002, PERTAINING TO ADMISSIBILITY OF CERTAIN EXHIBITS IN SUPPORT OF MOTIONS FOR A NEW TRIAL ON DAMAGES AND PUNITIVE DAMAGES AGAINST UDO ERASMUS, FLORA INC., FLORA LTD., AND THOMAS GREITHER

Date: November 7, 2005
Time: 1:30 p.m.
Place: Before the Honorable George P. Schiavelli,
United States District Court Judge

DESIGNING HEALTH, INC., a Colorado corporation, et al., Plaintiffs,	)
v.	)
UDO ERASMUS, an individual, et al., Defendants.	)
AND RELATED CLAIMS.	)

I, Allen Hyman, declare as follows:

1. I have personal knowledge of the facts set forth in this Declaration, and I could and would testify as to these facts if called upon to do so.

2. I set forth below, a description of the proceedings that occurred during the October, 2002 trial, with regard to admissibility of plaintiff DHI's damages evidence/supporting financial documentation and summary exhibits.

3. Attached to this declaration collectively as Exhibit A, are true and correct trial transcript pages of the testimony of Mary Ann Rensing, of (Trial Day 7), Friday, October 11, 2002, including the objections of counsel, and the rulings of the Court, indicating that the admissibility will be delayed upon further consideration and briefing.

4. Attached collectively to this declaration as Exhibit B, are the true and correct trial transcript pages of the

referenced testimony of Bernard Collett, of (Trial Day 9), October 16, 2005).

5. Attached to this declaration as Ex. C is the trial transcript where the Court indicates on October 22, 2002, that the evidence is closed.

6. Also attached to this declaration are selected pages from financial exhibits identified in the testimony of Mary Ann Rensing, and certain summary damage exhibits offered at the trial by Ms. Rensing and Bernard Collett.

Testimony Of Mary Ann Rensing To Authenticate Accounting Documents - Trial Day No. 7, October 11, 2002

7. The trial testimony of Mary Ann Rensing ("MAR") consists of forty-three (43) pages (pages 1121-1167) from October 11, 2002, trial day 7. Pages 22 to 58 are attached collectively as Ex. A.

8. MAR testified that she was:

> "...the accountant and office manager for Collett Veterinary Clinic and Designing Health." (RT 1122:23-24). Commenced her employment in "September 1980," (RT 1123:5), that from 1980 to 1990 her "duties were accounting..." (RT at 1123:10-12).

9. MAR testified that during "1990 to 1995," (RT at 1123:13-14), MAR was "doing accounting for the Collett Veterinary Clinic, and then the CVC R&D partnership, (the entity established by DR-RMC to finance DHI), and after that, for Designing Health." (RT at 1123:13-17).

10. MAR testified the would create financial statements, keep track of "sales, inventory" (RT at 1123:22-23), "payable ledgers," and "receivable ledgers," and "check registers," by herself or by people "under (her) supervision." (RT at 1124:1-7).

11. MAR was the accountant for DHI when "Petscriptions" (the first name of the corporation) "...started and did the books for Petscriptions and then Designing Health." (RT at 1124:14-17).

Exhibit 13013 - Sales

12. MAR identifies Ex. No. 13013, in part, as "Sales Analysis" (RT 1128:11-13) referring to Bates 020899) ("...as sales were processed it went into the computer system and at the end of the month came out as a report." "020899 was created by one of my staff." (RT 1128:23-25; and "each was created at the time they are dated." (RT 1129:1-3).

13. Exhibit No. 13013 (Bates 020898-020140), provides sales schedules for each month for 1995 and 1996, a monthly summary indicating what DHI products were sold and to whom the products were sold for the month, including both pet and human product. An example is included with this declaration, identified as Ex. 13013, (Bates 021070-021071), an accounting statement for the month of July 31, 1996, indicating "the total sales by DHI by product, by units, by cost of goods sold and by gross profit margin." The preceding pages (Bates 21058-21069), (included as part of Ex. 13013, attached) indicate the sales of July, 1996, by customer identity.

14. The Bates numbers indicate the documents as provided to defendants' counsel during discovery.

15. DHI wished to introduce Ex. 13013 (the entire series of monthly reports, 1995, 1996 and 1997) to show DHI sales, growth of sales, and to whom sales were made of the "Udo's Original" human product prior to the March, 1996 exclusive distribution agreement, with FP-INC and FP-LTD, and the termination of distributors during 1996, and how much in sales the existing distributors had provided of the DHI human product.

16. Upon DHI (on trial day 7) moving Exhibit 13013 into evidence (RT 1128:4-6), Mr. Burns, attorney for ERASMUS, objects only as to "relevance" (RT 1128:7) (emphasis added).

17. The Court indicates: "Sustained. We'll take care of it at the break, Mr. Hyman." (RT 1128:8-9). MR. HYMAN: Okay. Very good."

18. At RT 1129, DHI then attempts to move into evidence selected pages of Ex. 13013. Attorney for ERASMUS, "I continue the objection." "The Court:" "The entire document has been objected to based on relevance. So please go onto another area until we have an opportunity to discuss it." (RT at 1129:4-14).

19. Exhibit 13013, is never further discussed or considered, and its admission remains in limbo throughout the trial, and is never admitted (RTJN No. 18 (page 63), partial listing of exhibits identified and admitted at trial).

Exhibit 13016 - Sales, 1994

20. MAR identifies Exhibit 13016 as Sales Summaries for DHI by month for 1994, created at the month end as indicated

by MAR (RT: 1129:11-25). MAR stated she created the 1994 monthly DHI sales reports (RT 1130:1-3).

21. Upon DHI moving for admission of Ex. 13016, 1994 monthly sales reports, (Example, Bates 020891-0892, attached as Ex. 13016) attorneys for both Udo Erasmus, Mr. Burns: "Same Objection," (relevance), and attorney for the Flora Parties, Mr. Templeton: "Join" (RT at 1130:5-6).

22. The Court states: "Very well. We'll discuss it at the break."

23. The Court never rules one way or the other as to Ex. 13016 (RTJN No. 18 at page 63). Exhibit 13016 is never admitted.

Exhibit 13017 - DHI Profit & Loss Statement

24. MAR identifies monthly and yearly financial statements (RT 1130:8-17), she created for DHI during 1994, showing profit and loss and sales. (Example, Bates 020896-020897, attached as Ex. NO. 13017, indicates 1995 DHI income statement and total sales, $717,285.29).

25. Upon DHI moving Ex. 13017 into evidence, Udo Erasmus's counsel's states: "Could we reserve that also too, please?" "The Court: All right." (RT 1130:18-22).

26. The Court again never rules on the admissibility of Exhibit 13017, and it was never admitted (RTJN No. 18 at 63).

Exhibit 13001 - DHI Check Register

27. MAR testifies that Exhibit 13001 is a check register maintained in the ordinary course of business of DHI "3/12/96 to 9/24/96," (example: attached as Ex. 13001, is Bates 027630, the first page of the DHI check register).

28. Upon requesting that Ex. 13001 be moved into evidence, Udo Erasmus's counsel states: "Objection to relevance and it's awfully broad." (RT 1131:13-14). "The Court: All right. The objection on relevance will be taken up at the break." (RT 1131:15-16). Again, the Court never rules on the admissibility of Ex. 13001, and its not admitted (RTJN No. 18 at Page 62).

Exhibit 13003 - Sales By DHI For The Year 1997

29. Exhibit 13003 (Bates 020116-020375; 020114-020115), MAR testifies are: "...the sales report for the monthly periods "sales report for the period of February 1st 1997 through the end of February 1997" (RT 1132:1-2), "input(ed) through the system and I looked at them at the end of the month." MAR was in charge of the system, and the reports were created at the time so indicated (RT 1132:10-18), a report in alphabetical order of the customers of DHI, on a monthly basis (RT 1133:1-18). (Example, Bates 020219-020238, June, 1997, attached as Ex. 13003).

30. Upon DHI moving pages of Ex. 13003 into evidence, Mr. Burns, attorney for Erasmus, asserts: "Objection" "Relevance," Mr. Templeton (attorney for the FP) "Join" (RT 1133:19-23).

31. "The Court:" "Sustained until we talk about it at the break." (RT 1133:24-25). The Court never rules as to admissibility of Ex. 13003, (RTJN No. 18 at pg. 62).

Exhibit 13005

32. MAR identifies Exhibit 13005 as her handwriting, as a check register for the CVC, R & D Partnership (that was created to fund DHI), and that MAR made the entries on the "time so dated," "on a regular basis" (RT 1134:2-16), which indicate expenditures of DHI upon reliance upon representations of UE and FP), (Ex. 13005, page 1, attached as 13005).

33. DHI moves Exhibit 13005 into evidence with Udo Erasmus's counsel, "Mr. Burn: Same Objection." "The Court: Take it under submission" (RT 1134:16-19). The Court never rules as to the admissibility of Ex. 13005 (RTJN No. 18, page 62).

Exhibit 13007

34. Exhibit 13007 is a check register of the Collett Veterinary Clinic for July 1992 to December 1997, in MAR's handwriting: "That's mine" (RT at 1134:20-25). (Example, first page, Bates 020650, attached to this declarant Ex. No. 13007), again providing bases of DHI expenditures.

35. Upon DHI moving Ex. 13007 into evidence, (Udo Erasmus's counsel) "Mr. Burns: Same objection." (FP's counsel) "Mr. Templeton: Join." "The Court: Under submission." (RT at 1135:6-9). The Court never rules as to admissibility of Ex. 13007, (RTJN No. 18 at pg. 62).

Exhibit 843

36. Exhibit 843 is a check register in MAR's handwriting of the Collett Veterinary Clinic from March 1993 to December 1997 (RT 1135:19-24), which provided payment to DHI.

37. Upon moving Exhibit 843 into evidence, "Mr. Burns: "Objection on relevance." "Mr. Templeton: Join" (RT at 1136:9-11). The Court never ruled as to admissibility of Ex. 843. (DHI does not present an exemplar of Ex. 843 in this declaration).

Exhibit 844

38. Exhibit 844 are copies of checks to pay the bills of DHI, (RT 1136:12-21), for which the witness totaled (RT 1137:1-10).

39. "Mr. Burns: Objection." "The Court: Sustained." The Court stated it would take Ex. 844 under advisement, but never ruled upon. (DHI does not present an exemplar of Ex. 844 in this declaration).

Exhibit 846

40. Exhibit 846 are copies of checks of the CVC, R & D Partnership, which funded "research and development for the future products of Designing Health" (RT at 1137:14-23).

41. Upon requesting to move Exhibit 846 and MAR's total of the amount into evidence, (RT 1138:4-5), Udo Erasmus's counsel "Mr. Burns: Objection as to relevance." "The Court: Very well. I'll take it under submission" (RT 1138:4-

8). The Court never ruled as to Ex. 846. (DHI does not present an exemplar of Ex. 846 in this declaration).

Exhibit 847

42. Exhibit 847, is the CVC check register for July 1992, to December 1997, in MAR's handwriting made in the ordinary course of business (RT 1138:9-22).

42. Upon DHI moving Exhibit No. 847 into evidence, "Mr. Burns: Same objection" (RT 1138:25). "Mr. Templeton: Join" (RT 1139:1), "The Court: Under submission." (RT 1139:2). The Court never ruled as to Ex. 847. (DHI does not present on exemplar of Ex. 847 in this declaration).

Exhibit 13000

43. MAR testifies that Exhibit 13000 is a check register (RT 1139:7), of checks created through the computer system for Petscriptions (the corporate name prior to its change to DHI), which MAR, as manager of accounting had her assistance maintain. (RT 1139:11-23). (Example, Bates 022464, page 1 of Ex. 13000, attached as Ex. 13000).

44. Upon moving Exhibit 13000 into evidence, "Mr. Burns: Objection. Relevance." (RT 1139:24-25). "Mr. Templeton: Join" (RT 1140:1). "The Court: I'll take it under submission." (RT 1140:2). The Court never ruled on the admissibility of Ex. 13000 (RTJN Ex. No. 18 at 62).

Summary Exhibits Identified As 160009, 16000-10, 16000-11,16000-12 And 16000-13

45. On Trial Day 9, on October 11, 2002, at the conclusion of MAR's testimony, DHI requested the Court to consider exhibits identified as 16000-9 (DHI Sales, 1993), 16000-10 (DHI Sales by month, 1994), 16000-11 (DHI Sales, 1995), 16000-12 (DHI Sales, 1996) and 16000-13 (DHI Sales, 1997), (RT 1156:12-13), all attached to this declaration as identified.

46. Ex. 16000-9 to 16000-12 were summary exhibits of DHI sales previously provided to opposing counsel (RT 1156:16).

47. Mr. Burns states: "Objection" (RT at 1156:21): "For one they are inaccurate. They are portrayals of supposed facts and evidence which are not in evidence, and finally, I think they are probably irrelevant." (RT at 1156:23-25) (emphasis added).

48. The Court correctly identifies the exhibits by the correct exhibit Number and indicates it is a summary: "This is a summary, first page 16000-10." "Mr. Hyman: Right" (RT 1157:8-11).

49. The Court on October 9, 2002, as to the summary exhibits 16000-10 to 16000-16, indicates (after the objections to the foundational exhibits check registers, sales registers of DHI), that the, for example, Exhibit 16000-10 refers to 13016 and 13017 "which is not in evidence," "Mr. Hyman: Right" (RT 1157:18-21).

50. DHI's counsel indicates that the summaries are based upon the accounting records that were objected to earlier during MAR's testimony. (RT: 1158:1-3).

51. Mr. Burns objects: "Well, some of them are incomplete and misleading." (RT 1158:22-23).

52. As indicated in RTJN No. 17, the Court's Order of October 22, 2002, and RTJN No. 18, (at page 76:19-28, 10/22/02 by Ct.----Admitted), the Court does first admit the summary exhibits as to DHI Sales (the 16000 Series), first identified on Trial Day 7 (October 11, 2002), on October 22, 2002, after the close of testimony.

53. DHI could not present testimony accompanying its sales data, (a deficiency identified by the Court of Appeals Decision), in that the Court, prompted by objections of counsel for the FP and UE only as to relevance, delayed admissibility of the DHI sales data until after the close of evidence.

The Court Indicates The Rensing Exhibits WillBe Taken Up At The End Of The Day

54. Upon the withdrawal of the jury, "THE COURT: With regard to the exhibits there were objected to under Miss Rensing's testimony. I'd like to take that up at the end of the day. We only have 15 Minutes. Okay?" (RT 1178:14-22).

55. At the end of the day, on Friday, October 11, 2002, after some preliminary discussion as to MAR's accounting documents, the Court states as follows:

> "THE COURT: You know what, Counsel? I have a feeling this is going to be a rather

lengthy discussion. My staff has only now five minutes until the next matter that's coming up at 2:30. And so do I. So I am going to then order that you sit down, and you go through these things, and I'm going to order that you go have some lunch, and you can go to the attorney room and go through that this afternoon. And come up with your positions as to what you have resolved and what you haven't resolved and file something with time by noon on Monday. A joint statement if you have resolved everything. If you haven't resolved everything, then I want exactly each party's position with regard to each exhibit that was objected to in the Rensing testimony." (RT at 1285:20 to 1286:7).

Testimony of Bernard M. Collett
As To Summary Exhibits

56. Two trial days later, on Wednesday, October 16, 2001 (9th trial day), Bernard Collet testified, among other matters, as to certain summary exhibits (the 15000 series) he had prepared based on Ms. Rensing's accounting. The Court has not yet ruled on Ms. Rensing's exhibits.

Exhibit 15001 (Or 15000-1),
Costs Of DHI To Redesign Labels

57. Bernard Collett identified Ex. 15001 to which he testified but was not admitted (attached) as being in his handwriting (RT 1524:11-15), that Ex. 15001: "It's a compilation of costs incurred to redesign all the labels of Designing Health due to the introduction of competing products by Flora and Mr. Erasmus." (RT 1524:17-19).

58. DHI moves Ex. 15001 (or 15000-1) into evidence. (The 15001 series is also at times identified alternatively as 15000-1 and 15002). "MR. BURNS: No foundation. The underlying documents are not there." "Mr. Templeton: My objection is, your Honor, it's one, argumentative, if you look at the caption. It's conclusory as to what it is." "The Court: Well, I'm going to sustain Mr. Burns' objection on lack of foundation." (RT 1524:20 to 1525:5).

59. Mr. Collett testifies: "A. I went to the check ledgers with the underlying checks and simply went through and wrote down each check as expenditures, costs incurred to redesign all of the labels, the graphics, the brochures, the promotional material, after the introduction of competing products by Flora and Udo Erasmus." (RT 1524:20 to 1525:5).

60. When asking what the total amount is to of DHI to redesign the DHI labels. "Mr. Burns: Objection." "The Court: We'll have to deal with it later."

Exhibit 15002 (or 15000-2), Compilation of Expenditures To Promote The Goodwill Of Udo Erasmus (RT 1525:21-22)

61. Mr. Collett testified:

"A. This is a compilation of expenditures of Designing Health from inception in 1994 that were costs to promote the goodwill of Udo Erasmus on our promotional material, our labels, his book promotions, and all of the things that we had done over those years to promote Designing Health, using him as the principal spokesman.

Q. Using whose handwriting?

A. Mine." (RT at 1525:20 to 1526:2).

62. Mr. Collett is directed to Exhibit 13000 (a check register) which authentication was made by MAR (RT 1526:8-13).

63. Mr. Collett reviewed Exhibit 13000 to create document 15002 (RT 1526:23-25): "I went to the check registers and ledgers and the underlying checks and compiled all of the expenses incurred in promoting the likeness of Udo Erasmus." (RT at 1527:13-15).

64. Upon moving Exhibit 15002 (or 15000-2) into evidence, "The Court: Mr. Hyman, I've already sustained an objection as to lack of foundation, and will deal with this at the end of the day today, not now." (RT at 1528:3-5).

65. Although the Court would not allow questioning as to the 15000 Exhibits when Bernard Collett was on the stand (UE's and FP counsels' objections to the underlying Mary Ann Rensing exhibits taken under submission, not yet ruled upon as of October 16, 2002), on October 22, 2002, after the close of evidence, after Bernard Collett is no longer available to testify, the Court then issues an Order admitting the 15000 series (RTJN No. 17, Order of October 22, 2002). (RTJN No. 18, page 76:18-29, reflecting Court Order "10/22/02" "by Ct.").

Termination Of Distributors

66. Bernard Collett testifies as to the distribution agreement with Flora in August to December, 1995, and the "understanding we had with Flora U.S. were at the March 1996 Anaheim meeting and in the exchange thereafter." (RT 1552:18-24).

67. Bernard Collett is asked "once you had entered into those agreements, did you terminate any distributors?" "Yes." "Which ones did you terminate?" "We eliminated Washington Amory Pet Distributors. We eliminated and fired basically three people, let them go. Pet supplies plus out of the Los Angeles area" (1553:1-22). "They were terminated in mid-1996" (RT 1554:1-4) "Probably in the range of maybe 600,00 $700,000 in that first six months." (RT 1554:13-15). "Q. For those four distributors?" "A. Yeah" (RT 1554:15-16). And those distributors resulted in $270,000 in sales of human product (RT at 1555:1-10).

Admission Of The Summary Exhibits

68. The Court indicated on Friday, October 11, 2002, that the Court wanted the parties counsel to meet and confer, and file their respective statements as to the Ms. Rensing exhibits (RT 1286: 3-4).

69. On October 16, 2002, DHI files its "Basis on which Exhibits Identified by Mary Ann Rensing and Certain Other Exhibits Should be Admitted." (RTJN No. 12).

70. UE files objections (RTJN No. 13) as does the FP (RTJN No. 14).

71. The Court orders further briefing from all parties, without deciding the admissibility of MAR's exhibits or the summary exhibits. On October 17, 2002, DHI presents a Listing of Summary Exhibits Designing Health wishes to have admitted into evidence (RTJN No. 15).

72. The Court orders further briefing from all parties. RTJN No. 16, is the October 21, 2002, Statement of Designing Health as to the relevance of the summary exhibits.

The Parties Rest

73. On Tuesday, October 22, 2002, prior to the Court ruling on any of the financial documentation or the summary damage exhibits, each of the parties rest. (RT 2117:24), "THE COURT:" "Very Well. The evidence is over." (Attached as Ex. C).

74. The Court informs the jury that closing argument will commence on Thursday, October 24, 2002.

> "THE COURT:" "So tomorrow do not come in and on Thursday the 24th be here promptly at eight o'clock, and we will being with the instructions and it will be followed by closing arguments." (Ex. C, RT 2118:6-9).

75. The Court excuses the parties at 1:30 P.M., on October 22, 2002, and it is after the conclusion of Evidence that the Court on Tuesday, October 22, 2002 (RTJN No. 17), then issues its Order as to admission of summary exhibits based upon not yet ruled upon underlying admitted financial documents.

76. The Court conducts the jury instruction conference on October 23, 2002, and the parties present closing argument on October 24, 2002.

Court Admits Certain Summary Exhibits After Close Of Evidence

77. The Court never rules on the admission of Ms. Rensing's accounting records, taken under submission on October 9, 2002, but on October 22, 2002, after the close of evidence, the court then, for the first time, admits certain

summary evidence on October 22, 2002, at 5:00 P.M., with closing argument to commence on Thursday, October 24, 2002. (RTJN No. 17, is the court's Order of October 22, 2002, admitting certain summary exhibits, 15000 series, 16000 series, based upon accounting records that the Court did not admit). RTJN No. 18, page 76:19-28, indicates the Court Clerk's notation of admissibility on "10/22/02."

78. DHI had no opportunity to present any of the summary exhibits (16000 series, 15000 series) to the jury during trial, with sponsoring testimony.

UE's Damages For Breach Of Fiduciary Duty

79. As to the deficiencies indicated by the Federal Circuit's Decision (RTJN No. 5 at 15):

> "DH failed to present any evidence, in the form of lay or expert testimony as to why all of the costs of promoting DH's health supplement productions with Erasmus constitute economic losses resulting from Erasmus breach of Fiduciary Duty."

80. The summary exhibits were not admitted by the Court until after the close of evidence on October 22, 2002 (RTJN No. 17 and 18), and DHI was precluded from offering testimony as to "why the costs..." on the Chart 15000 "constitute economic loss."

81. The Circuit states, for example: "DH failed to present any evidence to explain why payments made to Erasmus as a director and manager of DH constitute economic losses..." (RTJN No. 5 at 15).

82. The summary Ex. No. 15000-4, was admitted after the close of evidence, and the Court (given the objections of UE and the FP) delayed the ruling until after the close of evidence, and DHI was unable to offer testify concerning the summary exhibit.

Fraud Damages

83. The DECISION (RTJN No. 5) indicates that:

> "DH offered no lay or expert testimony to establish prospective sales. Merely pointing to past sales is not enough...."

84. Given FP and UE's objections, the specific past sales of DHI by month, in detail (Ex. 13013 and 13016), were taken under submission and never ruled upon, and the summaries, based upon the underlying Rensing exhibits were only admitted on October 22, 2002, after the close of testimony. DHI was prevented from offering any testimony concerning "potential future sales," by the conduct of attorneys of FP and UE and by the Court's failure, as urged by opposing counsel, to even rule on the sales data submitted by MAR, which the FP and UE objected on the grounds of relevance only.

85. It is during closing argument on October 24, 2002, that DHI is first allowed to present to the jury its damages evidence by way of summary exhibit boards, 15000 and others, 16000, that the Court indicated it would first allow on October 22, 2002.

86. Thereafter, upon request by the jury, the FP and UE agreed that all the parties' closing argument boards could be submitted to the jury.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 11th day of October, 2005, at North Hollywood, California.

/s/
Allen Hyman

EXHIBIT A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE LOURDES G. BAIRD,
JUDGE PRESIDING

NO. CV98-4758-LGB(CWx) CV98-9088-LGB(CWx)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
JURY TRIAL - DAY 7
LOS ANGELES, CALIFORNIA
FRIDAY, OCTOBER 11, 2001

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DESIGNING HEALTH, INC., ET AL.,
PLAINTIFFS,

VS.

UDO ERASMUS, ET AL.
DEFENDANTS,

AND RELATED CASE.

MARK SCHWEITZER, CSR, RPR
OFFICIAL COURT REPORTER

UNITED STATES DISTRICT COURT
181-H ROYBAL FEDERAL BUILDING
255 EAST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012
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MR. TEMPLETON: We will call her in our case in chief, your Honor.

THE COURT: That's fine. We're done with her.

Ms. Lourie, could you step forward, please, and stand next to the court reporter.

THE CLERK: Would you raise your right hand.

MARIANNE RENSING, SWORN.

THE CLERK: Please state your name and spell your name in its entirety.

THE WITNESS: Marianne, M-A-R-I-A-N-N-E, Rensing, R-E-N-S-I-N-G, formerly Murdock-Lourie, M-U-R-D-O-C-K hyphen L-O-U-R-I-E.

THE COURT: Mr. Hyman.

DIRECT EXAMINATION

BY MR. HYMAN:

Q. Ms. Rensing, are you presently employed?

A. I'm retired.

Q. And when did you retire?

A. I retired -- I went on a medical leave in February of 2000 and then later that year retired.

Q. And before you retired, please tell the Court and jury what you did.

A. I was the accountant and office manager for Collett Veterinary Clinic and Designing Health.

Q. And was that a full-time position?

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A. Yes.

Q. When did you commence -- you said you were an accountant, office manager for the Collett Veterinary Clinic and Designing Health. When did you commence your employment?

A. September 1980.

Q. And with what entity was that?

A. Collett Veterinary Clinic.

Q. And who did you work for?

A. Doctor Collett.

Q. And during the period of 1980 to 1990, what were your duties?

A. Accounting.

Q. And during the period of 1992 to 19 -- 1990 to 1995, what were your duties?

A. I was doing the accounting for Collett Veterinary Clinic and then called CVC R&D partnership, and after that, for Designing Health.

Q. When you say your duties were accounting, could you please describe for us in more detail during the period of time '92 to the time you retired, what precisely would your duties -- what things did you do?

A. The financial statements and pulling all the information from the other people that worked for me. Sales, inventory.

Q. Did you keep ledgers?

A. Yes.

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Q. Did you keep payable ledgers and receivable ledgers?

A. Yes.

Q. Did you keep check registers?

A. Yes.

Q. And who was in charge of all of this?

A. I had people on my staff. They did it under my supervision.

Q. And you said you were also an accountant for Designing Health.

A. Yes.

Q. When did you become an accountant for Designing Health?

A. I went right away when Petscriptions was started and did the books for Petscriptions and then Designing Health.

Q. And with regard to Designing Health -- we're going to be looking at some documents, large documents. I'd like if you would please turn to 13012. It's in volume 10. The 10th volume of the Plaintiffs' book behind you on the top shelf.

A. What was that again?

Q. 13012.

A. Yes.

Q. The first document in there.

A. Yes.

Q. And do you recognize that document?

A. Yes.

Q. And do you know who created it?

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A. I did.

Q. Thank you very much. And do you know when you created it?

A. That was an ongoing thing at the end of every month.

Q. Okay. Now, I'd like you to look at the last -- there are five pages to 13012. Actually, there's the first three pages, and then there's two additional pages, Bates 020464 and Bates 020465. Do you see those?

MR. BURNS: Your Honor, my exhibit is different. I have a group of checks.

THE WITNESS: Yes, mine, to.

THE COURT: Which ones are you referring to? 02464 and 02465?

MR. HYMAN: That's correct.

THE COURT: You don't have those, Mr. Burns, the last two pages?

MR. BURNS: I may have those. I thought he was describing the whole exhibit.

MR. HYMAN: The fourth and fifth page.

THE COURT: It's not the fourth and fifth page.

MR. HYMAN: 02464 and 02465.

THE COURT: Which are the last two pages of this exhibit.

Q. BY MR. HYMAN: Do you have those in front of you, ma'am?

A. No.

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THE COURT: If you look at the very end of that exhibit.

THE WITNESS: Yes, I see it now.

THE COURT: You see the last two pages?

THE WITNESS: Yes, I see the last two pages.

THE COURT: Very well. It's before the witness.

Q. BY MR. HYMAN: And do you know what that is, ma'am?

A. That is a breakdown of expenses incurred when we rented the apartment for Udo Erasmus.

Q. And who created this?

A. I did.

Q. And from what did you create it?

A. From records that were kept on a monthly basis

MR. HYMAN: I'd like to move these two pages in evidence.

THE COURT: Objection?

MR. TEMPLETON: No objection.

MR. BURNS: I would be happy with the entire exhibit.

THE COURT: Well, you can offer it in your time if you wish to, Mr. Burns.

MR. HYMAN: I don't mind, your Honor.

THE COURT: Are you moving the entire exhibit in now?

MR. HYMAN: Yes.

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THE COURT: Any objection?

MR. BURNS: No objection.

THE COURT: Very well. The entire Exhibit 13012 is admitted in evidence.

(Exhibit 13012 received.)

MR. HYMAN: Thank you. I'm sorry, your Honor. The projector is not on.

THE COURT: Well, these sorts of things it would be well to do beforehand when you get here before eight o'clock.

MR. HYMAN: I'll move on to something else during the interim.

Q. Please look at, while the projector is warming up, 13013, the very next exhibit. It's another massive document.

A. Yes.

Q. And look through that a little bit. Do you know what 13013, the first page, is?

A. Yes. It's an inventory report.

Q. And how was that created?

A. By taking physical inventory, not by myself, but by one of my staff and then handed to me. I put it into a computer.

Q. Did you do it at or about the time the document so reflects?

A. Yes. That's one of the month-end reports.

Q. And what does an inventory, monthly inventory report show?

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A. Monthly inventory report shows the finished products, and it also shows the raw materials on hand.

Q. Excuse me?

A. If extended, it should also show raw materials on hand.

MR. HYMAN: Okay. I'd like to move 13013 into evidence.

MR. BURNS: Objection to relevance.

THE COURT: Sustained. We'll take care of it at the break, Mr. Hyman.

MR. HYMAN: Okay. Very good.

Q. After the first page, you'll see the title, you see 020899?

A. Yes.

Q. And what's this document, that page there?

A. It's what we call a sales report or sales analysis.

Q. And were you involved in the creation of the sales reports?

A. Not on the input of the sales. That was done by one of my staff.

Q. And how about -- how was the input done?

A. As sales were processed, it went into the computer system and at the end of the month came out as a report.

Q. And who created this report, this 020899?

A. That was the file at the end of the month was created by one of my staff.

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Q. And were they each created at or about the time so dated?

A. Yes.

MR. HYMAN: Your Honor, rather than moving the whole document in, I want to move selected pages of --

THE COURT: There is an objection to this document based on relevance, and I said we'd discuss it during the break.

MR. HYMAN: That was just the first document.

MR. BURNS: I continue the objection

THE COURT: The entire document has been objected to based on relevance. So please go onto another area until we have an opportunity to discuss it.

MR. HYMAN: Okay. I just want to -- okay.

Q. 13016, would you please look at that

A. I have a very bad copy here.

Q. Well, look at the second page. Maybe that's easier for you.

A. Yes.

Q. And can you identify that for us?

A. Yes.

Q. What is it, please?

A. Analysis of sales for July 1994.

Q. When was that created?

A. At the end of the month, at the end of July '94.

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Q. And who created

A. This report I created.

Q. Thank you very much. I'd like to move 13016 into evidence?

MR. BURNS: Same objection

MR. TEMPLETON: Join.

THE COURT: Very well. We'll discuss it at the break.

Q. BY MR. HYMAN: Now, 13017, could you please tell us what that document is, the first page

A. It's an asset and liability statement.

Q. Who created that?

A. I did.

Q. And when did you create this first page of 13017?

A. In March '94.

Q. And how did you go about creating it?

A. From individual records. Checking accounts.

MR. HYMAN: I'd like to move 13017 into evidence.

THE COURT: Objections?

MR. BURNS: Could we reserve that also, too, please?

THE COURT: All right.

Q. BY MR. HYMAN: Please look at 13001.

A. One-three?

Q. Yes, I'm sorry. You'll have to go to book 8.

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A. Yes.

Q. And on the first page of 13001, do you know whose handwriting that is?

A. My assistant, Katie Pulley.

Q. And what is this document?

A. It's a check register.

Q. And for what?

A. Checks written from at that time Petscriptions.

Q. And if you just would look, were these entries made at or about the time they were indicated?

A. Daily, yes.

MR. HYMAN: I'd like to move 13001 in evidence.

MR. BURNS: Objection to relevance, and it's awfully broad.

THE COURT: All right. The objection on relevance will be taken up at the break.

Q. BY MR. HYMAN: If you would please go to volume 9. Do you have the first document, 13003?

A. Yes.

Q. A rather voluminous document. I'd like you to look at the first -- I'd like you to look at the second page, and then continuing thereon to 020135. 020117 continuing to 020135. To you see that, ma'am?

A. Yes.

Q. Can you tell us what that group of pages is?

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A. It's the sales report for the period of February 1st, '97, through the end of February '97.

Q. 020117?

A. Yes.

Q. Maybe you -- and how were these created?

A. Input through the system and then I looked at them at the end of the month.

Q. And who was in charge of this system?

A. I was.

Q. Thank you. And were these -- when were these reports -- when was the -- if you look at -- I'm sorry. You know what? I combined two here for you. I went too far here. I'm sorry. When was -- yes. If you go to the last page I asked you, 020135, and then when was page 020135 created?

A. On the last day of February.

Q. What year?

A. 1997.

Q. And actually, I -- if you would go to 020136. Do you see that? After 020135.

A. 36?

Q. 020136, yes.

A. Okay.

Q. And 020136 to 020149, do you see that? Just look at that, those pages.

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A. Yes.

Q. Are these in alphabetical order?

A. I beg your pardon?

Q. Are they in alphabetical order?

A. Yes.

MR. BURNS: Objection.

THE COURT: Objection sustained. Vague.

Q. BY MR. HYMAN: Is what is listed in alphabetical order?

A. Those are --

Q. I just want to ask are they in alphabetical order?

A. Yes.

Q. And when -- and 020136 to 020149, what is that, those pages listed?

A. Sales.

Q. And who created this report?

A. I did.

Q. When?

A. 2/28/97.

MR. HYMAN: I'd like to move 020135, 020149 into evidence.

MR. BURNS: Objection.

MR. TEMPLETON: Join.

MR. BURNS: Relevance.

THE COURT: Sustained until we talk about it at the break.

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MR. HYMAN: Thank you very much.

Q. If we could move on to 13005.

A. What was that?

Q. The very next exhibit, 13005. And whose handwriting is that?

A. I must not have the right page.

Q. Excuse me. I'll wait until you get there. 13005, the very next exhibit.

A. Yes, that's my handwriting.

Q. And what is it?

A. It's a check register for CVC R & D partnership.

Q. And did you make those entries at or about the time so dated?

A. Yes.

Q. Do it on a regular basis?

A. Yes.

MR. HYMAN: I'd like to move 13005 into evidence.

MR. BURNS: Same objection.

THE COURT: Take it under submission.

Q. BY MR. HYMAN: And 13007. Would you please tell us what that is?

A. Check register, Collett Veterinary Clinic.

Q. And it's a large document. Do you know whose handwriting that is?

A. That's mine.

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Q. And did you make these entries at or about the date so indicated?

A. Yes.

Q. And did you do it on a regular basis?

A. Yes.

Q. I'd like to move 13007.

MR. BURNS: Same objection.

MR. TEMPLETON: Join.

THE COURT: Under submission.

Q. BY MR. HYMAN: I'd like you, please, if you would, this is volume 3, volume 3 of those books behind you. And I'd like you to look at the first exhibit, Exhibit 843. Do you see that,

A. I see it.

Q. What is it?

A. Check register.

Q. Whose handwriting is that?

A. Mine.

Q. What is that?

A. It's from Collett Veterinary Clinic from a different bank account.

Q. And it goes from what period of time? When did it start? Look at the last page and tell us.

A. March '93 through December '97.

MR. HYMAN: I'd like to move certain pages of that

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into evidence.

MR. BURNS: Can we know what pages they are?

MR. HYMAN: Well, if we have the same objection --

THE COURT: What pages do you wish to introduce?

MR. HYMAN: Your Honor, I'll hold off on that.

THE COURT: All right. You're not moving it --

MR. HYMAN: Yes, I move the entire document in evidence.

MR. BURNS: Objection on relevance.

MR. TEMPLETON: Join.

THE COURT: Very well.

Q. BY MR. HYMAN: Okay. 844. Do you know what that is?

A. Copies of checks.

Q. And copies of checks for what, if you know?

A. Advances for Petscriptions from Collett Veterinary Clinic.

Q. And you say advances. What do you mean?

A. To open bank accounts. The first two of them.

Q. And this Exhibit 844, did you have an understanding of what these payments were for?

A. Yes.

MR. BURNS: Objection.

MR. TEMPLETON: Join.

THE COURT: Sustained.

Q. BY MR. HYMAN: What were the payments for?

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A. Payments were coming from the Collett Veterinary Clinic to establish Petscriptions to pay the bills. They were loans.

Q. Pardon?

A. They were loans from Collett Veterinary Clinic to Petscriptions.

Q. Have you totaled this exhibit?

A. Yes.

MR. HYMAN: I'd like to ask the witness what the total is.

MR. BURNS: Objection. We're going to object to the --

THE COURT: Sustained.

Q. BY MR. HYMAN: And 846. Do you know what that is?

A. Yes.

Q. And what's that?

A. Check copies.

Q. Of what?

A. From Collett Veterinary -- loans from Collett Veterinary Clinic to CVC R & D partnership.

Q. And what was the CVC R & D partnership?

A. Research and development for the future products of Designing Health.

Q. And what were these checks for?

A. We opened first of all a bank account for that entity.

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And paid bills and expenses out of that.

Q. Have you totaled 846?

A. Yes, I did.

MR. HYMAN: I'd like to move 846 and its total into evidence.

MR. BURNS: Objection as to relevance.

THE COURT: Very well. I'll take it under submission.

Q. BY MR. HYMAN: And 847. Do you know what that is?

A. Yes.

Q. And what is that?

A. It's a check register.

Q. Whose handwriting?

A. My handwriting.

Q. Did you make the entries at or about the time so indicated?

A. Yes.

Q. And what's it a check register for?

A. Collett Veterinary Clinic.

Q. And over what period of time, if you look at the first --

A. July '92 through December '97.

MR. HYMAN: Thank you very much. I'd like to move that document into evidence.

MR. BURNS: Same objection.

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MR. TEMPLETON: Join.

THE COURT: Under submission.

Q. BY MR. HYMAN: I'd like you, please, to go to another book, volume 7. And at the end there's an Exhibit 13000.

A. Yes.

Q. And can you tell us what this is?

A. It's a check register.

Q. And how was it -- do you know how it was created?

A. Yes. Checks were written through the computers to the system.

Q. And it's a check register for what?

A. For Petscriptions, Inc.

Q. And who maintained this?

A. My assistant.

Q. Did you create any of these documents?

A. I did not create them by myself, no. One of my staff did.

Q. And how were they created?

A. Through the check register. I mean through the computer.

Q. And were they created on or about the dates so indicated on the pages?

A. Yes.

MR. HYMAN: 13000 into evidence, your Honor.

MR. BURNS: Objection. Relevance.

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MR. TEMPLETON: Join.

THE COURT: I'll take it under submission.

Q. BY MR. HYMAN: If we could, please, go to volume No. 11, the last volume. Volume 11 on the top shelf, I think.

THE COURT: It's not on the top shelf.

MR. HYMAN: Oh, sorry. That's right.

Q. And in that volume there's an Exhibit 14246.

A. Yes.

Q. And I'd like you to go -- there are numbers at the bottom, and I'd like you to go to where it says 303053.

A. 303053?

THE COURT: It's very difficult to see. Do you see those numbers at the bottom right on some of those pages?

THE WITNESS: Yes.

THE COURT: Well, if you look for 303052, it's the one next to it.

THE WITNESS: Yes.

Q. BY MR. HYMAN: Do you see this page, ma'am?

A. Yes.

Q. And if you just quickly go through and look at the document from that page onward.

THE COURT: Onward to the end of the exhibit?

MR. HYMAN: Yes, just briefly.

THE WITNESS: Yes.

Q. BY MR. HYMAN: Do you know what that section of pages

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is?

A. That's an aged accounts receivable. Yeah, accounts receivable.

Q. As of what date?

A. As of 12/29/97.

Q. Did your department create it?

A. Yes.

Q. And when did it create it?

A. On 12/29/97.

Q. And how was it created?

A. Through the system, computer system.

Q. That your department maintained?

A. Yes.

Q. Entries were made by your staff?

A. Yes.

Q. I'd like you, please, to go to -- we started at 303053, and go to the fourth -- go three pages more to 303056. Do you see that page?

A. Yes.

Q. Now, what is this document -- well, let me first ask. You say -- please describe just briefly, again, what this document is.

A. It's an aged accounts receivable.

Q. What's accounts receivable?

A. Money coming in. Payments on sales.

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Q. Payments that are owed?

A. Yeah.

Q. And it's aged. What do you mean by aged?

A. 30 days, 60 days, 90 days, over 90 dates.

Q. And this is in alphabetical order. It's listed by what? What are these entities on the left-hand column?

A. Customers.

Q. And I'd like to ask you - Well, first of all, your Honor, I'd like to certainly move 303056, the fourth page of this document, into evidence.

THE COURT: 303056 is the fourth page of this document?

MR. HYMAN: Well, the fourth page of this section that we started with, I'm sorry.

THE COURT: Let's just call it 303056 and not confuse the record any further.

MR. HYMAN: Thank you. 303056 and I'd like to move that document, that page into evidence.

THE COURT: Objection?

MR. TEMPLETON: Relevance, your Honor.

THE COURT: Take it under submission.

MR. HYMAN: And also to just be clear, I also wanted to move the entire section 303053 to the end of the document, which appears to be -- it's difficult -- 303067.

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MR. BURNS: Same objection.

MR. TEMPLETON: Join.

THE COURT: Same objection?

MR. BURNS: Yes.

THE COURT: Take it under submission.

Q. BY MR. HYMAN: I would, please, have you look at – we're now going to go to another book, book 5. And if you would, ma'am, in book 5, many tabs. One is 2108. And I believe, your Honor, that 2108 is in evidence.

THE COURT: Is 2108 in evidence?

THE CLERK: No.

THE COURT: It's not. We show it as not in evidence.

MR. HYMAN: I'm sorry. I thought it was.

THE CLERK: Is it 2018 or 2108?

THE COURT: 2108.

THE CLERK: No. It was only identified as page 1.

THE COURT: It's not in evidence. Is that the answer?

MR. HYMAN: Thank you. 2108.

Q. Have you seen that, ma'am?

A. Yes.

Q. Do you know what that is?

A. Yes, it's an invoice from Udo Erasmus to

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Designing Health.

Q. And as far as the figures, the amounts on that invoice, do you know who put those amounts in?

A. Yes, I did.

Q. And when did you do that?

A. On the date of the invoice. On March 5th, '97.

Q. And down below there are handwritten numbers. Do you know whose handwritten knows those are?

A. Those are mine.

MR. HYMAN: I'd like to move page 1 of 2108 into evidence.

MR. BURNS: May I have a voir dire?

THE COURT: Yes, you may. And when you refer to page 1, you're referring to 304549.

MR. HYMAN: Yes, your Honor, I am.

VOIR DIRE EXAMINATION

BY MR. BURNS:

Q. Ms. Rensing.

A. Yes.

Q. How are you?

A. Just fine.

Q. Good. Where did you get the numbers -- who gave you the numbers that you placed on this Exhibit 2108?

MR. HYMAN: Objection. Assumes facts not in evidence that someone --

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THE COURT: Overruled. You may answer the question.

THE WITNESS: The consulting amount was given to me by Dr. Collett.

Q. BY MR. BURNS: What about the other amounts?

A. State taxes that I figured out on the amount of the consulting fee, and the other things, there was an agreement that Udo Erasmus would pay part of the apartment we rented. And then the rest of it is a speeding ticket and books that Mr. Erasmus bought on the American Express card.

Q. And how did you know about those books?

A. It was listed on the statement of the American Express, month-end statement.

Q. And you just took it off; is that correct?

A. Yes, I took it off the statement. The card was in Udo Erasmus's name.

Q. Now, do you recall when you testified in this cases in a deposition?

MR. HYMAN: Objection, your Honor. We're here for voir dire. I object to the question on the --

THE COURT: What is the basis of the objection?

MR. HYMAN: Form of the question, your Honor.

THE COURT: Overruled. You may answer the question.

THE WITNESS: I beg your pardon?

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Q. BY MR. BURNS: You remember giving testimony in a deposition in this case?

A. Yes.

Q. And do you recall saying that you would have placed, when you completed this form, you would have written a check based on it?

A. Yes.

MR. HYMAN: Objection, your Honor. Argumentative. Impeachment --

MR. BURNS: I'm not impeaching.

THE COURT: Well, let's see, do you have something in the deposition that you wish to --

MR. BURNS: Why don't I just ask her.

Q. Once you had this invoice in form?

A. Yes.

Q. What would you do?

A. Write a check for the balance.

Q. And you would send the check to Udo Erasmus one way or another?

A. Yes.

Q. And this document you would file; is that correct?

A. Yes.

MR. BURNS: No further questions.

THE COURT: All right.

MR. BURNS: I don't have any objection.

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THE COURT: Very well. How about you, Mr. Templeton? Any objection to page -- that first page, 304549?

MR. TEMPLETON: No, your Honor.

THE COURT: It's admitted.

(Exhibit 304549 received.)

DIRECT EXAMINATION (RESUMED)

BY MR. HYMAN:

And, in fact, behind that page, do you see the next three items behind that page? What's that information?

A. That's part of the American Express credit card statement.

Q. And then 304551, the page after that?

A. A check to the Municipal Court for a citation.

Q. And then after that?

A. The actual -- a copy of the actual citation.

Q. Why don't --I'd like, then, your Honor, we might as well move the backup document in, too. 304 --

THE COURT: Is there an objection?

MR. BURNS: Objection. Irrelevant.

THE COURT: Sustained.

Q. BY MR. HYMAN: Now, we'll put this on. And if we can have a look at it here. Now, the form -- I'd like to ask you about -- let me actually zoom down a little bit. We have a

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form here.

A. Yes.

Q. The actual form itself.

A. Yes.

Q. And did you -- how often did you make out one of these forms in 1996?

A. 12, I believe.

Q. Pardon?

A. 12.

Q. 12?

A. Yes.

Q. How often did you do that?

A. Once a month.

Q. And did you use these forms in 1995?

A. Yes.

Q. Did you use them in -- well, you have one here for 1997. When did you start using these farms?

MR. BURNS: Objection. I'm beginning to wonder about the relevance.

THE COURT: Sustained. Are you objecting on relevance?

MR. BURNS: Yes.

THE COURT: Any further questioning with regard to this?

MR. BURNS: No.

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THE COURT: Objection sustained.

Q. BY MR. HYMAN: How was the form created?

MR. BURNS: Objection.

THE COURT: Sustained.

MR. HYMAN: Well, I think it is --

THE COURT: We're not going to argue it. This whole relevance issue is going to have to be taken up outside the presence of the jury at a break. So please don't go into it.

MR. HYMAN: Okay.

Q. Go back to 13012. There was a page, Bates 02064. You can look at it on the screen, volume 10. And it says there Mountain Terrace Apartment.

A. Yes.

Q. And it says July 1996 lease payment, 2,426.50. Do you see that?

A. Yes.

MR. BURNS: Objection. Relevance.

THE COURT: Sustained.

Q. BY MR. HYMAN: Let me have you please look at volume 10, 14001.

And that's in evidence, your Honor.

Do you see that?

MR. BURNS: It's not in evidence against Dr. Erasmus. It's agreed that you would not use it against

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Dr. Erasmus.

THE COURT: Please check, and tell me if 14001 is in evidence.

THE CLERK: No.

THE COURT: It is not in evidence.

MR. HYMAN: I think it was stipulated in evidence yesterday.

MR. TEMPLETON: That's correct, your Honor, but not as to Dr. Erasmus.

THE COURT: Very well.

Q. BY MR. HYMAN: Do you recognize 14001?

A. Yes.

Q. And what is it?

A. It's a comparison chart, Flora sales, Flora LTD, and Flora Canada. And on the bottom it shows the sales from DHI without Flora.

Q. And who created this document?

A. I did.

Q. Behind this document is 14001-A, which is the same information.

A. For 1997, yes.

Q. For 1997.

A. Um-hm.

MR. HYMAN: I'd like to put 14001-A --

THE COURT: You're moving this into evidence?

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1151

MR. HYMAN: Yes, it's just the same --

THE COURT: Is there an objection.

MR. BURNS: The same --

THE COURT: Same objection, as to not to Dr. Erasmus?

MR. BURNS: Correct.

THE COURT: Sustained.

MR. TEMPLETON: We have a stipulation.

THE COURT: Fine. It's admitted as to the Flora parties, but it is not admissible as to Dr. Erasmus.

MR. HYMAN: That is correct.

(Exhibit 14001-A received.)

Q. BY MR. HYMAN: What does this document show?

A. Sales by Flora. 1996, 1997.

Q. And sales by whom to Flora? Sales by whom? Who made the sales?

A. Designing Health.

Q. Thank you. Now, I want to go up here a little bit. You have 14001-B in front of you?

A. Yes.

Q. And what is that -- and what is that document?

A. Purchases from Designing Health.

Q. By whom?

A. By Flora.

Q. Is there a difference between Flora, Inc., and Flora

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1152

LTD?

A. Yes.

Q. What's 14001-A?

A. Flora LTD.

Q. And I'd like to blow that up.

THE COURT: As to 14001-B, is that also part of the stipulation?

MR. TEMPLETON: Yes, your Honor.

THE COURT: All right. Then it's admissible as to the Flora parties but not to Dr. Erasmus.

MR. BURNS: Correct.

(Exhibit 14001-B received.)

Q. BY MR. HYMAN: And what's that show, the top part of 14001-A?

A. Can you clarify that?

Q. Do you see on the screen there, ma'am?

A. 1996.

Q. And 1996 what?

A. Human product sales.

Q. And sold to whom?

A. From Designing Health to Flora.

Q. And I'd like to look -- have you look at -- first we have here from January to October on the screen. January to November. Try to squeeze December in. And what's that show, that schedule from January to December 1997?

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1153

A. Sales to Flora LTD for the year 1997.

Q. For what --

A. By month.

Q. Pardon?

A. By month.

Q. For what?

A. Sales of human products.

Q. And I'd like now to look at 14001-B. And what's that top part? What's that, ma'am?

A. It's sales from Designing Health to Flora, Inc., for the human product for 1996 and 1997.

Q. And you have them there by month.

A. Yes.

Q. Is that correct? Are those figures respectively monthly figures?

A. Yes.

MR. HYMAN: I'd like to show for 1997.

Q. And what's that, ma'am?

A. That's the human product sold to Flora, Inc., for 1997 by month.

Q. I'll put the total up here. And that's the total for 1997?

A. Yes.

Q. And the total for 1996.

A. Yes.

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1154

Q. For human Flora, Inc.; correct?

A. Yes, that's correct.

Q. And over here for Flora LTD, 1997; is that correct? That's the total?

A. That's correct.

Q. Thank you. Now, Miss Rensing, did you ever meet Udo Erasmus?

A. Yes.

Q. When?

A. June 1992.

Q. And how did you meet him?

A. I picked him up from the airport in Los Angeles.

Q. Did you read his book?

A. Yes.

Q. Do you recall ever seeing a product identified as Udo's Choice Oil Blend?

A. Yes.

Q. When is the first time you saw that product?

A. I don't recall. 1996, end of 1996. That's the oil; right?

Q. The oil.

A. Or '97.

Q. Did you use it?

A. Yes.

Q. Did you have any conversations with Udo Erasmus about

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1155

it?

A. Yes.

Q. And -- well, how did you come to use it?

A. The clinic used flax oil in the treatment of the animals before all this started. And then I was introduced to the Udo's Choice oil by Udo Erasmus.

Q. Now, did you have contact with Udo Erasmus in 1995?

A. Yes, as necessary, yes.

Q. And what was the nature of those contacts?

A. It usually had to do with money, writing checks. And just the general nature, yes.

Q. Did you have contact with Udo Erasmus in 1996?

A. Yes.

Q. And what was the nature of those contacts?

A. Um, he needed a place to stay, and we rented an apartment. I did that.

Q. And how often would you see Udo Erasmus in 1996? Are you able to tell us?

A. No. Because he wouldn't always come into my office.

Q. And did you have contact with Udo Erasmus in 1997?

A. The earlier part, yes.

Q. And did you have contact -- when was the last time you saw Udo Erasmus?

A. It was --

MR. BURNS: Objection. Relevance.

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1156

THE COURT: Sustained.

MR. HYMAN: I do have, your Honor, another document to move into evidence, but I wanted to do that at the time with the other documents.

Your Honor, we have some exhibits I wish to place in front of the witness which I gave to opposing counsel the other day, and I don't believe it made it into the Court or the clerk's set or the witness's set. If I could approach, I've discussed this with counsel.

THE COURT: What exhibits are they? Are they marked?

MR. HYMAN: 16010, -11, -12, and -13, and if I could hand a set to the witness, the clerk, and yourself.

THE COURT: I'm assuming that opposing counsel has seen the documents?

MR. HYMAN: Yes.

MR. BURNS: I don't remember seeing --

THE COURT: Mr. Hyman, if you could please show them to opposing counsel.

MR. HYMAN: Okay.

MR. BURNS: Objection.

THE COURT: What is the basis of the objection?

MR. BURNS: For one, they are inaccurate. They are portrayals of supposed facts and evidence which are not in evidence, and finally, I think they are probably irrelevant.

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1157

MR. HYMAN: May I approach?

THE COURT: You have copies for the Court?

MR. HYMAN: Yes, absolutely.

Q. And do you see these documents?

A. Yes.

Q. 16010?

A. Yes.

THE COURT: Mr. Hyman, I just noticed one thing here. This is a summary, first page, 16000-10.

MR. HYMAN: Right.

THE COURT: So this is not 16010. It's 16000-10.

MR. HYMAN: Right.

THE COURT: Is there any reason it's numbered in this fashion?

MR. HYMAN: Yes, your Honor, because they come from the same -- some of them come from the same sources of documents.

THE COURT: Well, we'll discuss that later. The first one I've just looked at. It's a summary, and it refers to Exhibit 13016 and 13017, which is not in evidence.

MR. HYMAN: Right.

THE COURT: And No. 11 refers to 13013, which is also not in evidence.

MR. HYMAN: They are all not in evidence, your Honor.

* * * * *

THE COURT: And Exhibit 130 -- they are all referring to exhibits that have been objected to.

MR. HYMAN: That's correct. Though I --

THE COURT: So did you want to establish some kind of foundation or something with this witness? I was curious what the purpose is of these.

MR. HYMAN: Yes. Other than -- these are additions of those documents made by the witness, but if I'm --

THE COURT: I'm not telling you how to try your case, but I to want to remind you that the information that is in them presumably is subject to these objections that we're going to be resolving.

MR. HYMAN: Since they are all objected to and everything is objected to, I just wanted to get them as part of the collection of matters that are --

THE COURT: What are you doing with them? They are in front of the witness. Go ahead.

MR. HYMAN: Your Honor, I will offer these in evidence, these summaries.

THE COURT: Is there an objection other than relevance for these summaries?

MR. BURNS: Well, some of them are incomplete and misleading.

THE COURT: So is it lack of foundation or what?

MR. BURNS: Lack of foundation, yes.

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1178

Q. Where you discussed the renewal?

A. Well, there was no renewal. She terminated it.

Q. My question is did you have any discussion about the renewal?

A. It involved the renewal. We didn't have a renewal.

Q. Did you discuss with her the term renewal?

MR. TEMPLETON: Objection. Argumentative, your Honor.

THE COURT: Sustained.

THE WITNESS: No.

THE COURT: Let's take our break, ladies and gentlemen. 15 minutes.

(WHEREUPON THE JURY WITHDRAWS.)

THE COURT: With regard to the exhibits that were objected to under Miss Rensing's testimony, I'd like to take that up at the end of the day. We only have 15 minutes. Okay?

MR. HYMAN: Okay.

MR. BURNS: Thank you, your Honor.

(Recess taken.)

THE COURT: Mr. Hyman.

MR. HYMAN: Thank you very much, your Honor.

Q. Sir, please turn to 14151.

A. What volume is that, please?

Q. Volume 11.

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have dailies -- and come to me on Tuesday and let me know what you have resolved; all right?

Now, with regard to the sales to Flora, you are saying that -- let's see, is that right? Sales to Flora or Flora sales?

MR. HYMAN: That's our sales to Flora and Flora LTD.

THE COURT: Your sales. What's that have to do with it? I thought we were talking about Flora's sales of Designing Health's products.

MR. HYMAN: We're talking about purchases of Designing Health's product.

MR. TEMPLETON: That's already in. I believe counsel referred to 13003. The purchase --

THE COURT: Are you saying that that evidence is already in?

MR. TEMPLETON: I'm saying that he has a summary of what they claim to be the purchases from Designing Health of product by Flora companies. I agreed to --

THE COURT: You know what, Counsel? I have a feeling this is going to be a rather lengthy discussion. My staff has only now five minutes until the next matter that's coming up at 2:30. And so do I. So I am going to then order that you sit down, and you go through these things, and I'm going to order that you go have some lunch, and you can go to

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1286

the attorney room and go through that this afternoon. And come up with your positions as to what you have resolved and what you haven't resolved and file something with me by noon on Monday. A joint statement if you have resolved everything. If you haven't resolved everything, then I want exactly each party's position with regard to each exhibit that was objected to in the Rensing testimony.

MR. HYMAN: Your Honor, if I might, also there was a -- if we could add to that issue 14002, which is their royalty statements.

THE COURT: Their what?

MR. HYMAN: There was an exhibit we began to talk about this morning. I just wanted to --

THE COURT: 14002, did I rule on it?

MR. HYMAN: No, you ruled on part of it, which said Udo's --

THE COURT: Counsel, I don't want to hear it. We'll deal with this Tuesday.

MR. HYMAN: Your Honor, one more issue I would bring up.

THE COURT: Bring it up now, quickly.

MR. HYMAN: With regard to impeachment witness Robin Wild, if she could be called as a witness, and the Court said --

THE COURT: Didn't we deal with her before?

* * * * *

EXHIBIT B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE LOURDES G. BAIRD,
JUDGE PRESIDING

NO. CV98-4758-LGB(CWx),CV98-9088-LGB(CWx)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
JURY TRIAL - DAY 9
LOS ANGELES, CALIFORNIA
WEDNESDAY, OCTOBER 16, 2001

PAGES 1460 - 1625

DESIGNING HEALTH, INC., ET AL.,
PLAINTIFFS,

VS.

UDO ERASMUS, ET AL.
DEFENDANTS,

AND RELATED CASE.

MARK SCHWEITZER, CSR, RPR
OFFICIAL COURT REPORTER

UNITED STATES DISTRICT COURT
181-H ROYBAL FEDERAL BUILDING
255 EAST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012
(213) 626-7570

* * * * *

A. Yes.

Q. When did you first see this?

A. I saw this about March 15th, 16th, 1998.

Q. And how did you see it?

A. I saw this at the trade show being introduced by Flora at the Anaheim Expo West trade show.

Q. And have you seen 14028 before?

A. Yes.

Q. When did you first see this?

A. At the Anaheim 1998 Expo West trade show.

Q. Sir, I'd like you to go to your book, which is the last volume, No. 11, 15001. Do you recognize 15001?

A. Yes.

Q. Whose handwriting?

A. Mine.

Q. What is it?

A. It's a compilation of costs incurred to redesign all the labels of Designing Health due to the introduction of competing products by Flora and Mr. Erasmus.

MR. HYMAN: I'd like to move 15001 into evidence.

THE COURT: Objections?

MR. BURNS: Yes.

THE COURT: What's the basis?

MR. BURNS: No foundation. The underlying documents are not there.

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1525

MR. TEMPLETON: My objection is, your Honor, it's, one, argumentative if you look at the caption. It's conclusory as to what it is.

THE COURT: Well, I'm going to sustain Mr. Burns' objection on lack of foundation.

Q. BY MR. HYMAN: How did you create 15001?

A. I went to the check ledgers with the underlying checks and simply went through and wrote down each check as expenditures, costs incurred to redesign all of the labels, the graphics, the brochures, the promotional material, after the

introduction of competing products by Flora and Udo Erasmus.

Q. And how much was that total?

MR. BURNS: Objection.

THE COURT: Sustained. Have you provided the underlying documents for this exhibit to opposing counsel?

MR. HYMAN: I believe we have.

THE COURT: We'll have to deal with it later.

Q. BY MR. HYMAN: 15002, what is that, sir?

A. This is a compilation of expenditures of Designing Health from inception in 1994 that were costs to promote the goodwill of Udo Erasmus on our promotional material, our labels, his book promotions, and all of the things that we had done over those years to promote Designing Health, using him as the principal spokesman.

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1526

Q. Using whose handwriting?

A. Mine.

MR. HYMAN: Your Honor, I'd represent to the Court --

THE COURT: Don't represent to the Court anything. If there's an objection, we'll deal with it.

MR. HYMAN: Thank you very much.

Q. Would you please go to Exhibit 13000. It's a large document.

THE COURT: What volume is that in?

MR. HYMAN: That is in volume No. 7.

THE WITNESS: What was the exhibit?

MR. HYMAN: 13000, sir.

MR. BURNS: Your Honor, the exhibit is the subject of a motion that is pending before you, and we filed an opposition.

THE COURT: You're going to move to exhibit into evidence?

MR. HYMAN: No, I'm not at all, your Honor. I'm just going to ask the witness --

THE COURT: Just do what you're going to do. You don't have to tell me what you're going to do.

Q. BY MR. HYMAN: This Exhibit 15002, to what extent did you review Exhibit 13000 to create that document, 15002?

A. Yes.

* * * * *

Q. And what did you do to create 15002?

A. This is a computer printout from our database. I directed the people that work under me --

Q. What did you do in your handwriting on 15002?

A. Oh. 15002?

Q. Yes.

A. Oh, I'm looking at 13000.

Q. 15002.

A. Yeah, on 15002 --

Q. Whose handwriting?

A. Mine.

Q. What did you do to create 15002?

A. I went to the check registers and ledgers and the underlying checks and compiled all of the expenses incurred in promoting the name and likeness and book of Udo Erasmus.

Q. Did you review Exhibit 13000 in doing that?

A. Yes, I did.

Q. Did you review 13001 in doing that? Would you go to 13001, sir.

A. That would be in what volume?

Q. Volume 8.

A. Yes.

Q. And Exhibit 15003, what is that, sir?

A. 15003?

Q. Yes. Sir, let's stay with 15002.

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1528

And I'd like to move 15002 into evidence.

MR. BURNS: Objection.

THE COURT: Mr. Hyman, I've already sustained an objection as to lack of foundation, and we will deal with this at the end of the day today, not now.

MR. HYMAN: Very good. Thank you very much.

Q. Sir, do you have an estimate of what Designing Health sales would have been of the human product had it not been distributed --

THE COURT: Objection, Mr. Hyman. Please move away from the area that is already at issue and please move on

to something else. We will deal with these things and to the foundation of these outside of the presence of the jury. We don't want that to be going on now.

MR. HYMAN: I have no further questions. I thank the Court.

THE COURT: Very well.

Mr. Burns, cross-examination.

MR. BURNS: Your Honor, as I understand it, this deposition was not filed, and here is a certified copy. The parties have stipulated that the plaintiffs would file the party's deposition. I thought it was filed.

THE COURT: Mr. Hyman, did you file the depositions of this witness with the Court?

MR. HYMAN: Yes, I am told that absolutely we did.

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1552

MR. HYMAN: Objection. Relevance, your Honor.

THE COURT: Sustained.

Q. BY MR. BURNS: At the time you entered into an agreement with Flora to be a distributor of products for Designing Health, could you say when that time was?

A. Yes, I testified to that.

Q. Okay. What was that time?

A. You want to though when we entered into an agreement with Flora?

Q. Yes.

A. Which one?

Q. Were there more than one?

A. Yes, there was.

Q. All right. Why don't you list the agreements and tell me when you entered into them with Flora.

A. Can you define Flora, like you want to know about agreements with U.S. Flora or with Canada Flora?

Q. I really don't care.

A. Okay. Agreements developed around the distribution of our human product with Flora Limited beginning, as I've testified, in August through December of 1995. And the agreements that we entered into and the understandings that we had with Flora U.S. were at the March 1996 Anaheim meeting and in the exchanges thereafter.

Q. Now, once you had entered into those agreements, did you

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1553

terminate any distributors?

A. Yes.

Q. Which distributors did you terminate?

A. We terminated about four distributors. I might not get them all, Mr. Burns, but I'm going to try.

Q. All right.

A. We eliminated Washington Amory Pet Distributors in the northwest region. We eliminated and fired basically these people, let them go, Pet Supplies Plus out of the Los Angeles area. We let go Consolidated Pet Distribution. I believe that was a midwest type or distributor. And there may have been one more that I can't recall. Those would -- about four of them were let go.

Q. And that was it? No more?

A. Those were the ones that were actually let go. Yes. Fired or whatever you want to call it.

Q. All right. Terminated.

A. Terminated. That's a good word.

Q. All right. How much income had those companies produced for you during the six-month period prior to the time you terminated them?

MR. HYMAN: Objection. Indefinite as to the time.

THE COURT: Six months prior to the time they were terminated. Overruled. You may answer the question.

THE WITNESS: They were terminated in mid-1996. So

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we're talking about the beginning of '96 through mid-'96. You know, we had sales reps. So I got to -- you know, this is a very difficult question for me to pin down. I don't know. I really would be guessing, Mr. Burns.

Q. BY MR. BURNS: Would it be more than $10,000?

A. Yes.

Q. Would it be more than a hundred thousand dollars?

A. Yes.

Q. Would it be more than $200,000?

A. That probably is in the range. Well, it probably would be more than that. Yeah.

Q. Would it be more than $300,000?

A. It probably would be in the range of maybe 600,000, $700,000 in that first six months.

Q. For those four distributors?

A. Yeah.

Q. Now, did they distribute Designing Health product to any health food stores?

A. Yes, yes, they did.

Q. And what percentage of their business was distributions to health food stores?

A. I don't know. That was their business.

Q. Well, do you know how much of your human product they bought during the first six months of 1996?

A. No, not specifically.

* * * * *

1555

Q. Could you tell us the range for that?

A. About 30 percent to 35 percent of -- this is the only way I can do this question, Mr. Burns, okay? Human product was averaging between 30 and 40 percent -- 30, 35 percent of our sales at that time. So the only way I can get at your question, if you really want me to, is in 1996 the company grew to 1.8-plus million. So I'm going to divide that in two. So now we have 900,000. And now I'm going to multiply it by .3. So now we have about $270,000, somewhere in that range.

Q. And is it your testimony, then, that these four distributors accounted for 50 percent of your business in 1996?

A. In 1996, distributors, yeah, 40, 50 percent of our distribution was through distributors.

Q. These four distributors.

A. Well, them and the Cross Company. We had the Cross Company down in Texas. So maybe four, maybe five, and we discussed what I remember of those.

Q. You didn't terminate the Cross Company, did you?

A. No, we converted them.

Q. Okay. Let me refer you to Exhibit 535.

A. What volume?

Q. I believe that should be in your second book, plaintiffs' second book.

* * * * *

EXHIBIT C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE LOURDES G. BAIRD,
JUDGE PRESIDING

NO. CV98-4758-LGB(CWx), CV98-9088-LGB(CWx)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
JURY TRIAL - DAY 12
LOS ANGELES, CALIFORNIA
TUESDAY, OCTOBER 22, 2002

PAGES 1981 - 2134

DESIGNING HEALTH, INC., ET AL., PLAINTIFFS,	)
VS.	)
UDO ERASMUS, ET AL. DEFENDANTS,	)
AND RELATED CASE.	)

MARK SCHWEITZER, CSR, RPR
OFFICIAL COURT REPORTER

UNITED STATES DISTRICT COURT
181-H ROYBAL FEDERAL BUILDING
255 EAST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012
(213) 626-7570

* * * * *

What I think I'll do is I'm going to let them go on the 23rd. We're not going to have trial on the 23rd. That's going to allow me to give you the instructions that I intend to give by sometime early tomorrow morning, and then you can come back to me with a verdict form, and we'll have it ready to go on the 24th. And then we'll have the 24th. I have to leave at 11:30 on the 25th. But certainly we'll have four and a half hours on the 24th, and then we'll have another two and a half hours on the 25th. We should be done by then. All right?

MR. HYMAN: Your Honor, if the Court will allow.

THE COURT: Are they ready? Bring them in. Mr. Templeton, I'm going to limit you to one and a half hours.

(WHEREUPON THE JURY ENTERS.)

THE COURT: Your next witness, Mr. Lustigman or Mr. Templeton?

MR. TEMPLETON: The Flora parties rest, your Honor.

THE COURT: Rest. All right.

Mr. Burns?

MR. BURNS: The defendant Udo Erasmus rests.

THE COURT: All right. Is there any rebuttal?

MR. HYMAN: No rebuttal, your Honor.

THE COURT: Very well. The evidence is over. We have a lot of legal issues that we're going to have to deal

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with. And I know especially perhaps for you, Mr. Nolfo, I don't know if you're here or in Santa Barbara, but I'm not going to call you in tomorrow. That way it will give all of us plenty of time to resolve all of these things. The jury instructions and verdict forms and whatnot.

So tomorrow do not come in. And on Thursday, the 24th, be here promptly at eight o'clock, and we will begin with the instructions, and it will be followed by the arguments. I can assure you that the case will be ready for you to begin your deliberations no later than the 25th, sometime soon after the 25th. All right. So you are excused.

By the way, even though you've heard all of the evidence, I do want to remind you again of an instruction I gave you early on. Don't make up your mind as to which way this case should be or what your verdict should be. You haven't heard the closing arguments or the instructions, and you haven't had an opportunity to talk among yourselves. So keep in mind what the testimony has been. But please don't try to make up your mind one way or another on it.

So I hope you will enjoy your extra hour, and have a nice day tomorrow, and I will look forward to seeing all of you, then, here in the box promptly on October 24th at eight o'clock.

If we're not done on the 24th, which we may not be

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EXHIBIT 13000

RUN DATE: 01/18/96 Petscriptions, Inc. PAGE 3

RUN TIME: 12:07 PM ACCT NO. 01 - PETSCRIPTIONS, INC.

CHECK REGISTER YEAR TO DATE

CK NO.	DATE	PAYEE	AMOUNT	CLR	MEMO	SRC
1327	01/05/96	JANICE GRANUM	585.59	N		A
1328	01/03/96	PEARSON SALES COMPANY	945.00	N		A
1329	01/03/96	BASIC VEGETABLE PRODUCTS	685.10	N		A
→ 1330	01/03/96	KIEV 870 AM	1250.00	N		A
1331	01/03/96	CASH	500.00	N		A
1332	01/05/96	RAIZY GOFFMAN	30.60	N		A
1333	01/05/96	STAUBER, INC.	463.22	N		A

CK NO.	DATE	PAYEE	AMOUNT	CLR	MEMO	SRC
1334	01/05/96	ROBIN OBERG	585.59	N		A
1335	01/05/96	DEBORAH HOUSE	585.59	N		A
1336	01/05/96	JANICE GRANUM	585.59	N		A
1337	01/05/96	RALPH (JIM) WAGONER	585.59	N		A
1338	01/05/96	KOCH SUPPLIES, INC.	203.81	N		A
1339	01/05/96	NUTRIQUEST	438.23	N		A
1340	01/05/96	WEINSTEIN NUTRITIONAL PRO	1735.54	N		A
1341	01/05/96	INSURANCE FINANCE CORP.	834.08	N		A
1342	01/05/96	STUDEBAKER-WORTHINGTON	166.32	N		A
1343	01/05/96	REED REFERENCE PUBLISHING	252.40	N		A
1344	12/16/95	OFFICE DEPOT	500.00	N		A

CK NO.	DATE	PAYEE	AMOUNT	CLR	MEMO	SRC
1345	01/05/96	SGS CANADA INC.	110.00	N		A
1346	01/05/96	MCKESSON WATER PRODUCTS	19.50	N		A
1347	01/05/96	KBET 1220AM STEREO	125.00	N		A
1348	01/05/96	GORDON MURPHREE	402.80	N		A
1349	01/05/96	TOM MC KEE	41.32	N		A
1350	01/05/96	ROBERT CROSS	1171.32	N		A
		TOTAL . . . . .:	116588.15			

* - Number is out of sequence

*** End of Check Register ***

EXHIBIT 13001

ACCT # 06670-0 [?] 9 3/12/96 Through 9/24/96

CHECK NO.	DATE	CHECK ISSUED TO	IN PAYMENT OF	AMOUNT OF CHECK		✓	DATE OF DEPOSIT	AMOUNT OF DEPOSIT		BALANCE	
1996		Petscriptions Ins.		BALANCE BROUGHT FORWARD ➤							
	3/12	Deposit				✓		100	00	100	00
	3/22	Deposit				✓		1000	00	1100	00
	4/1	Deposit				✓		12133	22	13233	22
1601	4/1	Los Robles Bank	Payment BOSLEY inv.#6137	4402	50	✓				8830	72
1602	4/1	Franchise Tax Board	pre paid taxes	800	00	✓				8030	72

CHECK NO.	DATE	CHECK ISSUED TO	IN PAYMENT OF	AMOUNT OF CHECK		✓	DATE OF DEPOSIT	AMOUNT OF DEPOSIT		BALANCE	
1996		Petscriptions Ins.		BALANCE BROUGHT FORWARD ➤							
	3/29	Monthly Service Charge		5	61	✓				8025	11
	4/3	Deposit				✓		4601	38	12626	49
1603	4/5	KDAR-FM ←	March Radio	756	00	✓				11870	49
1604	4/5	Animal World ←	Feb. Radio	600	00	✓				11270	49
1605	4/5	Captured Images, Inc.	before & after photos	261	11	✓				11009	38
1606	4/5	KIEV Radio ←	April Radio	1875	00	✓				9134	38
1607	4/5	Federal Express	postage	51	50	✓				9082	88

CHECK NO.	DATE	CHECK ISSUED TO	IN PAYMENT OF	AMOUNT OF CHECK		✓	DATE OF DEPOSIT	AMOUNT OF DEPOSIT		BALANCE	
1996		Petscriptions Ins.		BALANCE BROUGHT FORWARD ➤							
1608	4/5	AT&T Credit Corporation	lease on phones	193	54	✓				8889	34
1609	4/5	Studebaker-Worthington	lease on computer	154	82	✓				8734	52
1610	4/5	KFMB AM Radio ←	Feb · Mar. Radio	1200	00	✓				7534	52
1611	4/5	Bank of America	overdraft pymt	500	00	✓				7034	52
1612	4/5	Honeyville Ctrain, Inc.	fine rice bran	1357	20	✓				5677	32
1613	4/5	K&B Trucking	shippin #1 ALL	228	79	✓				5448	53

CHECK NO.	DATE	CHECK ISSUED TO	IN PAYMENT OF	AMOUNT OF CHECK		✓	DATE OF DEPOSIT	AMOUNT OF DEPOSIT		BALANCE	
1996		Petscriptions Ins.		BALANCE BROUGHT FORWARD ➤							
1614	4/5	Weinstein Nutritional	parsly/licorice	286	88	✓				5161	65
1615	4/5	Deborah House	sal/com 4/8-4/12	736	54	✓				4425	11
1616	4/5	Granum Associates	sal/com 4/8-4/12	736	54	✓				3688	57
1617	4/5	Jim Wagoner	sal/com 4/8-4/12	736	54	✓				2952	03
1618	4/5	Robin Obery	sal/com 4/8-4/12	736	54	✓				2215	49
	4/5	Deposit				✓		20685	19	22900	68
1619	4/8	Foothill Electric Motors	tuning Pulley & Belt	102	15	✓				22798	53

CHECK NO.	DATE	CHECK ISSUED TO	IN PAYMENT OF	AMOUNT OF CHECK		✓	DATE OF DEPOSIT	AMOUNT OF DEPOSIT		BALANCE	
1996		Petscriptions Ins.		BALANCE BROUGHT FORWARD ➤							
1620	4/9	North American Van Lines	shipping cross & NT Trade Show	1340	07	✓				21458	46

EXHIBIT 13003

RUN DATE: 06/30/97 PAGE: 1

SALES REPORT BY CUSTOMER
Designing Health, Inc.

FOR SALES PERIOD 06/01/97 TO 06/30/97

CUSTOMER NAME		AMOUNT
#1 ALL SYSTEMS	$	12,799.44
17TH ST. ANIMAL HOSPITAL	$	180.00
A CANINE GOODLIFE	$	236.80
A DOG'S BEST FREIND	$	10.95
A TO Z PETS	$	75.00
A-1 PET CENTER INC.	$	100.00
A-TO-Z PET & SUPPLY	$	90.00
ADAMS ANIMAL CLINIC	$	120.00
ADOLPH MURATORI	$	15.00
AEQUUS VET. SERVICES	$	367.00
AFFORDABLE PETCARE CENTER	$	0.00
AGUA JITO	$	90.00
AIRPORT ANIMAL HOSPITAL	$	0.00
ALAN DAVADIK	$	90.00
ALBANY GROOMING CENTER	$	183.00
ALEX BELL VET CLINIC	$	223.75

CUSTOMER NAME	AMOUNT
ALEXANDER T. LAMAR	$ 56.80
? FRONHEISER	$ 20.00
ALL ANIMAL & BIRD HOSP.	$ 180.00
ALL BREED GROOMERS	$ 123.75
ALL CREATURES ACCUPUNCTURE	$ 232.00
ALL CREATURES ANIMAL HOSP	$ 270.00
ALL CREATURES VET CARE	$ 90.00
ALL CREATURES VET CLINIC	$ 97.50
ALL PETS ANIMAL HOSPITAL	$ 162.50
ALL VALLEY PET HOSPITAL	$ 450.00
ALLAN & LYNN WILK	$ 36.00
ALLISON VETERINARY	$ 0.00
ALPHA-FOODS	$ 284.00
ALPHARETTA ANIMAL HOSP.	$ 330.00
ALTA GROOMING	$ 90.00
ALTOS VET. CLINIC	$ 405.00
ALVIN & KATHLEEN VON RUFF	$ 15.00
ALWAYS NATURAL PET FOOD	$ 105.00
AMANDA MORRISON	$ 15.00
AMY POLKEY	$ 15.00
AMY SCHLOTTAG	$ 56.80
AN-JAN FEED & PET SUPPLIE	$ 0.00
ANABEL'S BEAUTY	$ 135.00
ANACORTES ANIMAL HOSP	$ 0.00

CUSTOMER NAME	AMOUNT
ANDERSON PET SHOP	$ 45.00
? KESSLER	$ 47.50
? HANSON	$ 15.00
ANGELA ROBERTSON	$ 15.00
ANIMAL & BIRD CLINIC	$ 701.25
ANIMAL CARE CENTER	$ 66.00
ANIMAL CARE CLINIC	$ 0.00
ANIMAL CLINIC	$ 0.00
ANIMAL CRACKERS	$ 180.00

CHECK NO.	DATE	CHECK ISSUED TO	IN PAYMENT OF	AMOUNT OF CHECK		✓	DATE OF DEPOSIT	AMOUNT OF DEPOSIT		BALANCE	
									BALANCE BROUGHT FORWARD ➤		
111	✓	MCI	BUD CALLING CARD	128	82	✓				1,869	26
112	5/3/94	REX PERKINS	NEW LABELS	950	00	✓				919	26
113	5/10/94	VOID		-0	-					919	26
114	✓	SGS CANADA, INC.	SUPPLEMNT. ANALYS.	66	00	✓				853	26
115	✓	MERCHANT & GOULD	HEALTH-SCRIPTIONS LEGAL SERV.	135	00	✓				718	26

EXHIBIT 13005

CVC R & D PARTNERSHIP

CHECK NO.	DATE	CHECK ISSUED TO	IN PAYMENT OF	AMOUNT OF CHECK		✓	DATE OF DEPOSIT	AMOUNT OF DEPOSIT		BALANCE	
							BALANCE BROUGHT FORWARD ➤				
—	3-14-94	TO OPEN ACCOUNT						100	00	✓ 100	00
—	3-29-94	CHECK PRINTING (DEPOSIT SLIPS)		14	51	✓					
—	4-5-94	" " (CHECKS)		136	41	✓					

CHECK NO.	DATE	CHECK ISSUED TO	IN PAYMENT OF	AMOUNT OF CHECK		✓	DATE OF DEPOSIT	AMOUNT OF DEPOSIT		BALANCE	
										BALANCE BROUGHT FORWARD ➤	
—	4-7-94	MONTHLY SERV. CHARGE		4	37	✓					
—	4-14-94	DEPOSIT						1,000	00	✓944	71
101	4-14-94	LUCAS MEYER	25KG EMULPUR NPI	149	50	✓					
102	4-14-94	VALU-DRY	30# LM APPLE POW.	93	10	✓				702	11
103	4-18-94	JARROW FORMULAS, INC.	UDO MUSCLE MULTI/AMIN O?	61	00	✓				641	11

CHECK NO.	DATE	CHECK ISSUED TO	IN PAYMENT OF	AMOUNT OF CHECK		✓	DATE OF DEPOSIT	AMOUNT OF DEPOSIT		BALANCE	
								BALANCE BROUGHT FORWARD ➤			
104	4-21-94	DESIGNING HEALTH	CONSULT/ REIMB.	4,788	07	✓					
105	4-21-94	REX PERKINS	ON ACCT. BROCH. DESIGN	775	00	✓					
/	4-22-94	DEPOSIT						7,000	00	✓2,078	04
/	4-25-94	DEPOSIT						2,500	00	4,578	04
106	4-27-94	VOID		-0	-						

CHECK NO.	DATE	CHECK ISSUED TO	IN PAYMENT OF	AMOUNT OF CHECK		✓	DATE OF DEPOSIT	AMOUNT OF DEPOSIT		BALANCE	
								BALANCE BROUGHT FORWARD ➤			
107	✓	DOCTOR'S DATA INC.	SUPPLEMENT ANALYS.	79	00	✓					
108	✓	REX PERKINS	BAL. BROCH. DESIGN	765	88	✓					
109	✓	SGS CANADA INC.	SUPPLEMENT ANALYS.	603	50	✓					
110	✓	AMERICAN EXPRESS	TRAVEL - UDO BUD	1131	58	✓					

EXHIBIT 13007

B OF M - JULY, ? TO DEC., ?
COLLETT VET. CLINIC
(SECURITY PACIFIC)

NO. RECORD OF CHECKS DRAWN MONTH OF JULY, 1992

CHECK AMOUNT					✓	CHECK NO.	DAY	IN FAVOR OF	ACCOUNTS PAYABLE				
		-	0	-	✓	7026	7/1	VOID					
	3	7	0	58	✓	7027	7/3	BURNS VET SUPPLY					
		3	9	71	✓	7028	7/7	SO. CALIF. GAS CO.			3	9	71
	2	9	5	51	✓	7029	✓	GTE CALIF.		2	9	5	51
		4	9	30	✓	7030	✓	US WEST COMMUNICAT.			4	9	30
	1	1	9	70	✓	7031	✓	L.A. CELLULAR TEL. CO.		1	1	9	70

CHECK AMOUNT					✓	CHECK NO.	DAY	IN FAVOR OF	ACCOUNTS PAYABLE				
	2	1	6	00	✓	7061	✓	BARLEAN'S ORG. OILS					
1	7	3	1	00	✓	7062	7/14	BERNARD M. COLLETT					
	1	7	0	00	✓	7063	✓	ERIC SWEETLAND					
	6	8	3	19	✓	7064	7/15	PACE					
2	8	7	2	93	✓	7065	✓	SMITH KLINE BEECHAM	2	8	7	2	93
24	5	5	2	4?					?	?	?	?	?

EXHIBIT 13013

RUN DATE: 07/31/96 PAGE: 1

SALES REPORT BY CUSTOMER
Designing Health, Inc.

FOR SALES PERIOD 07/01/96 TO 07/31/96

CUSTOMER NAME		AMOUNT
#1 ALL SYSTEMS	$	2,340.00
17TH ST. ANIMAL HOSPITAL	$	190.00
A CANINE GOODLIFE	$	0.00
A CUT ABOVE	$	90.00
A TOUCH OF LOVE	$	28.40
A-1 PET GROOMING	$	0.00
A.F. DISTRIBUTION	$	135.00
ACE PET EMPORIUM	$	60.00
AL HATTEN	$	15.00
ALEXANDER T. LAMAR	$	56.80
ALFRED BLAUSTINE	$	15.00
ALICE DONNER	$	19.50
ALL BREED GROOMERS	$	90.00
ALL CREATURES ANIMAL HOSP	$	180.00
ALL THE BEST PET CARE CO.	$	1,362.00

CUSTOMER NAME	AMOUNT
ALPHARETTA ANIMAL HOSP.	$ 180.00
AMBER KELLEHER	$ 113.60
?	$ 90.00
? BEAUTY	$ 270.00
ANACARE CATALOG	$ 2,381.00
ANIMAL CONNECTION	$ 0.00
ANIMAL CRACKERS	$ 180.00
ANIMAL HOUSE	$ 90.00
ANIMAL HOUSE 1	$ 100.00
ANIMAL HOUSE 2	$ 100.00
ANIMAL HOUSE 3	$ 100.00
ANIMAL NUTRITIONAL PROD.	$ 0.00
ANIMAL SUPPLY COMPANY	$?0,410.00
ANIMAL WORLD	$ 0.00
ANN DENMART	$ 15.00
ANNE PICK	$ 30.00
ARDEN VET. HOSPITAL	$ 90.00
ARLENE KINYON	$ 54.00
ARNOLD'S HAY & GRAIN	$ 85.20
AUDREY DE PAULA	$ 22.50
AUDREY WILLARD	$ 15.00
BACK IN THE SADDLE	$ 225.00
BANNER DOG GROOMING	$ 67.50
BARBARA BUFFINGTON	$ 15.00

CHECK NO.	DATE	CHECK ISSUED TO	IN PAYMENT OF	AMOUNT OF CHECK		✓	DATE OF DEPOSIT	AMOUNT OF DEPOSIT		BALANCE	
								BALANCE BROUGHT FORWARD ➤			
	5/18/94	DEPOSIT						1,500	00	✓	
116	✓	REX PERKINS	BROCH. DESIGN	1,454	90	✓					
	5-6-94	FEE (SERVICE CHARGE)		9	00	✓				754	36
117		DESIGNING HEALTH	CONSULT./ ?	4,992	28	✓				(4237	92)

CHECK AMOUNT					✓	CHECK NO.	DAY	IN FAVOR OF	ACCOUNTS PAYABLE				
	1	2	5	75	✓	7032	✓	MEDICO PROF. LINEN		1	2	5	75
	1	0	0	00	✓	7033	✓	D&D DISPOSAL		1	0	0	00
	1	7	7	99	✓	7034	✓	COOPERS HARDWARE		1	7	7	99
		1	2	87	✓	7035	✓	SYLMAR HARDWARE			1	2	87
	1	3	8	02	✓	7036	✓	PROF. PRINTING CENTERS		1	3	8	02
		8	1	00	✓	7037	✓	PROF. ANIMAL LAB			8	1	00
	8	5	5	54	✓	7038	✓	PITMAN-MOORE		8	5	5	54
3	1	0	2	80	✓	7039	✓	SMITH KLINE BEECHAM	3	1	0	2	80
	-	0	-			7040	✓	VOID					
	5	7	0	20	✓	7041	✓	WESTERN MEDICAL		5	7	0	20

CHECK AMOUNT					✓	CHECK NO.	DAY	IN FAVOR OF	ACCOUNTS PAYABLE				
	1	1	0	41	✓	7042	✓	MWI VET. SUPPLY		1	1	0	41
1	3	8	2	15	✓	7043	✓	MWI VET. SUPPLY					
1	4	8	2	19	✓	7044	✓	NAT'L INS. SERV., INC.					
2	0	0	0	00	✓	7046	✓	CUC-MAINT. ACCT.					
	3	4	6	80	✓	7045	✓	M. MURDOCK-LOWRIE		3	4	6	80
	5	7	9	73	✓	7047	7/9	THE UPJOHN CO					
2	5	0	0	00	✓	7048	7/10	H. BALM & SONS, INC.					
	1	7	2	32	✓	7049	✓	D.V.M. SUPPLY, INC.					
		-	0	-		7050	7/13	VOID					

CHECK AMOUNT					✓	CHECK NO.	DAY	IN FAVOR OF	ACCOUNTS PAYABLE				
		-	0	-		7051	✓	VOID					
		5	1	00	✓	7052	✓	PACIFIC BELL					
		1	7	50	✓	7053	✓	SECURITY CREDIT SERV.					
		7	2	49	✓	7054	✓	MWI VET. SUPPLY					
	4	0	3	55	✓	7055	✓	WESTERN MED. SUPPLY					
	9	3	1	49	✓	7056	✓	VCA					
	1	1	4	50	✓	7057	✓	BFI MEDICAL WASTE SYST.		1	1	4	50
		8	9	29	✓	7058	✓	SUPERIOR X-RAY					
		5	9	65	✓	7059	✓	AT&T					
	5	2	7	25	✓	7060	✓	M. MURDOCK-LOWRIE					

CUSTOMER NAME	AMOUNT
BARBARA RICE	$ 15.00
BARBARA SHOEMAKER	$ 10.95
BEAUTY FOR THE BEAST	$ 90.00
BETSY'S HEALTH FOODS	$ 30.00
?GEN	$ 39.00
?ONESTY	$ 22.50
BETTY LOU THOMAS	$ 135.00
BETTY REED	$ 22.50
BEULAH ALEXANDER	$ 39.00
BEVERLY RHODES	$ 37.50
BIG AL'S PET FOOD G.H.	$ 202.50

EXHIBIT 13017

RUN DATE: 01/03/96
RUN TIME: 5:00 PM

Petscriptions, Inc.

PAGE: 1

Prior Period Income Statement
FOR THE MONTHS ENDING 01/31/95 TO 12/31/95

YTD RATIO . . . . . : NET REVENUE		12 MONTHS		RATIO
INCOME				
	SALES	717,285.29		96.5
	SALES - FREE SAMPLES	17,356.52		2.3
	SHIPPING FEES COLLECTED	8,980.29		1.2
	LATE FEES COLLECTED	22.05		0.0
COST OF SALES				
PURCHASES	PURCHASES - RAW MATERIALS	162,011.57	✓	21.8
	PURCHASES - PRODUCTS	6,552.18	✓	0.9

247a

YTD RATIO . . . . . : NET REVENUE		12 MONTHS		RATIO
	PURCHASES - BOXES	10,613.36	✓	1.4
	PURCHASES - LABELS	23,495.42	✓	3.2
	PURCHASES - BAGS	59,794.72	✓	8.0
	PURCHASES - PACKAGING MATL	3,820.98	✓	0.5
FREIGHT				
	FREIGHT-PURCHASES	11,354.71	✓	1.5
	COMMISSIONS	101,480.16		13.6
	SPECIAL PROD. HANDL. FEES	155.20		0.0
EXPENSES				
	ADVERTISING - PRINT	4,927.16		0.7
	ADVERTISMENT - RADIO & TV	35,895.20		4.8
	CONSULTATION	29,324.00		3.9
	PRODUCT MARKETING	23,484.15		3.2

YTD RATIO . . . . . : NET REVENUE	12 MONTHS	RATIO
GRAPHIC DESIGN (LABL. ETC)	22,200.69	3.0
DEPRECIATION EXPENSES	466.00	0.1
DISCOUNTS	496.12	0.1
INSURANCE	8,590.24	1.2
TAXES & LICENSE FEES	1,803.57	0.2
LATE FEES PAID	107.26	0.0
BANK FEES & DISCOUNTS	199.53	0.0
LEGAL & ACCOUNTING	8,815.07	1.2
PRODUCT TESTING	5,004.50	0.7
MISCELLANEOUS	1,602.92	0.1
MAINTAINANCE	4,034.45	0.5
AUTO EXPENSES	380.00	0.1
SHOW EXPENSES	424.00	0.1

YTD RATIO . . . . . : NET REVENUE	12 MONTHS	RATIO
REIMBUR. FOR SHOW EXPENSE	888.71	0.1
SHOP (TOOLS, SHELVES, ETC)	9,839.27	1.3
SHOP SUPPLIES	14,629.30	2.0
OFFICE & TECH SUPPORT EXP	936.50	0.1
OFFICE SUPPLIES	13,444.51	1.8
PAYROLL		
WAGES	115,242.61	15.5
EMPLOYER EXP. (P/R TAXES)	9,769.58	1.3
EMPLOYEE GROUP HEALTH INS	4,343.17	0.6
MISCELLANEOUS LABOR	5,907.89	0.8

c.o.s. purchases
324, 325.81 ÷ 12 =
27,027/mo

EXHIBIT 15001

Costs Incurred to Redesign labels/Brochures Due to Udo/Flora 5/20/01
5/98 → 12/98

Date	Ck #	Vendor/Purpose	Amount
~~?~~	~~4795~~	~~?~~	~~?~~
5/22/98	5066	Viking Lithograph - brochures	819.00
5/22/98	5070	Steve Teeple - graphic design	400.00
6/12/98	5195	Viking Lithograph - Ads/brochures	1,989.88
6/26/98	5252	D. Krupp Consulting - label consulting	225.00
7/6/98	5371	" " - " "	37.50
7/31/98	5423	Steve Teeple - graphic design	320.00
8/3/98	5??7	Viking Lithograph - brochures/labels	5438.04
8/14/98	5521	" " - labels	5156.00

Date	Ck #	Vendor/Purpose	Amount
8/21/98	5545	D. Krupp Consulting - label consulting	412.50
8/21/98	5566	Municipal - label logo	340.00
8/28/98	5580	Steve Teeple - graphic design	160.00
9/18/98	5699	Viking Lithograph - brochures	655.00
9/25/98	572?	D. Krupp - label consulting	243.35
10/2/98	5756	Creative Wing - label design	6,486.34
10/2/98	5760	Guzman - graphic design	4,607.35
10/9/98	5819	Jim Tompkins - web redesign	474.38
10/13/98	5827	" " - " "	446.88
10/28/98	5892	" " - " "	488.13
11/3/98	5915	" " - " "	316.25
11/13/98	5932	Steve Teeple - graphic design	200.00

Date	Ck #	Vendor/Purpose		Amount
11/13/98	5984	Jim Tompkins - web redesign		467.50
11/16/98	5994	T. Keller photo - New Product Photos		2,141.18
11/25/98	6033	D. Krupp - label consulting		112.50
12/11/98	6117	Viking Lithograph - brochures		750.00
12/11/98	6120	Creative Wing - graphic design		10,174.18
			Total	112,932.16

EXHIBIT 15002

Good Will - Udo E. - From Petscriptions 5/18/01

1996

Date	Ck #	Vendor/Purpose	Amount
1/5/96	1347	KBET 1220 AM - radio	125.00
1/3/96	1330	KIEV 870 AM - radio	1,250.00
1/16/96	1360	Ralph's ? -brochures	55.00
1/26/96	1398	Viking Lithographs - labels	2,957.39
1/26/96	1406	Laura Lee Show - radio	866.66
1/26/96	1407	Doke & The Doctor - radio	2,000.00
1/31/96	1415	H.H. Backer -Trade show	1,200.00
2/2/96	1417	Steven Teeple -Graphic Design	1,500.00
2/2/96	1424	Viking Lithograph - labels	3,334.00

Date	Ck #	Vendor/Purpose	Amount
2/2/96	1427	Barleans' Organic Oil –? Oil	424.67
2/2/96	1428	Laura Lee Show – radio	866.66
2/9/96	1448	KIEV 870 AM – radio	1,000.00
2/9/96	1453	Viking Lithograph – labels	12,991.30
2/14/96	1463	Steven Teeple – Graphic Design	500.00
2/16/96	1478	KIEV 870 AM – radio	2,625.00
2/16/96	1487	KDAR/KKLA – radio	756.00
3/1/96	1545	KIEV 870 – radio	2,625.00
3/1/96	1550	Viking Lithograph – brochures	159.91
3/8/96	1576	KOAR/KKLA – radio	756.00
3/19/96	1596	H.H. Backer –Trade Show	200.00
3/15/96	1605	Viking Lithograph – labels	7,895.76

Date	Ck #	Vendor/Purpose	Amount
3/15/96	1606	KFMB 760 AM - radio	400.00
3/19/96	1595	Expositions, Inc. -Trade show	747.50
3/19/96	1596	H.H. Backer - Trade show	200.00
3/15/96	1605	Viking Lithograph - labels	7,895.76
3/15/96	1606	KFMB 760 AM - radio	400.00
		Subtotal Page 1	$?
3/22/96	1615	Doggie Tech - Adv'ting	130.00
3/22/96	1618	Beyond Health - radio	560.00
3/28/96	1653	Steven Teeple -Graphic Design	1,000.00
3/28/96	1654	Jon Patch - radio	1,200.00
5/3/96	1718	Viking Lithograph - brochures	587.01
5/3/96	1719	Beyond Health - radio	400.00
5/8/96	1720	KIEV 870 AM - radio	2,875.00

Date	Ck #	Vendor/Purpose	Amount
DHI			
4/5/96	1603	KOAR FM - radio	756.00
4/5/96	1604	Animal World - radio	600.00
4/5/96	1606	KIEV - radio	1,875.00
4/5/96	1610	KFMB AM - radio	1,200.00
4/12/96	1633	Viking Lithograph - labels/brochures	7,076.96
4/26/96	1691	KIEV - radio	875.00
4/26/96	1694	A.E.N. Group Ltd. - Adv'ting	1,500.00
4/26/96	1698	Steven Teeple - Graphics	1,000.00
4/26/96	1699	Viking Lithograph - brochures	1,423.49
4/26/96	1703	Laura Lee Show - radio	866.66
4/29/96	1676	Barkleigh Productions-Trade Show	492.50
5/1/96	1677	West Coast Signs - Adv'ting	1,093.95

Date	Ck #	Vendor/Purpose	Amount
5/3/96	1719	Beyond Health - radio	400.00
5/3/96	1720	KIEV - radio	2,875.00
5/3/96	1726	KFMB - radio	1,250.00
6/3/96	1727	The Laura Lee Show - radio	866.66
5/10/96	1745	A.E.N. Group Ltd. - radio	750.00
5/10/96	1751	Viking Lithograph - Labels	2,285.59
5/10/96	1753	Steven Teeple - Graphics	1,000.00
		Subtotal Page 2	$?
5/10/96	1755	KDAR - FM - radio	756.00
5/16/96	1760	National Dog ? Assoc - Trade Show	400.00
5/17/96	1776	KFMB - FM - radio	1,125.00
5/24/96	1786	Mountain Terrace Apt's - Udo Apt	100.00
5/24/96	1802	Viking Lithograph - photos	910.30

Date	Ck #	Vendor/Purpose	Amount
5/29/96	1819	KFMB - FM - radio	1,375.00
5/29/96	1820	Viking Lithograph - labels	6,973.00
6/3/96	1828	Beyond Health - radio	320.00
6/4/96	1833	A.E.N. Group Ltd - radio	1,500.00
6/6/96	1837	Jan Patch - radio	150.00
6/7/96	1839	Alive Books - Udo books	1,150.02
6/7/96	1842	Sas?ki Stuff - labels	138.56
6/7/96	1844	KIEV - radio	2,500.00
6/7/96	1849	Viking Lithograph - labels	10,018.59
6/10/96	1829	Grandweb - website adv'ting	300.00
6/10/96	1830	Ray Masel -Skyy Dog - radio	1,000.00
6/14/96	1832	Caparav Studios - TV commercial	1,937.65
6/14/96	1884	Steven Teeple - Graphics	1,500.00

Date	Ck #	Vendor/Purpose	Amount
6/14/96	1885	KABC - radio	450.00
6/21/96	1894	Grandweb - web Adv'ting	300.00
6/21/96	1895	Tom Keller Photography - Packaging Photos	561.82
6/21/96	1896	The Pet Professional - Adv'ting	275.00
6/21/96	1897	Animal World - radio	600.00
6/21/96	1898	KABC Radio - radio	450.00
6/21/96	1899	St. Francis Productions - TV Ad	1516.66
6/27/96	1932	Corporate Studios - TV Ad	968.32
		Subtotal Page 3	$?
6/27/96	1933	Ray Masel - radio	600.00
6/27/96	1936	KABC - radio	450.00
6/27/96	1937	David Raber - Adv'ting	1,000.00
6/27/96	1940	Viking Lithograph - brochures	2,883.56

Date	Ck #	Vendor/Purpose	Amount
7/3/96	1975	Medical Corp of America - radio	2,600.00
7/3/96	1976	KVEN Broadcast Group - radio	993.60
7/3/96	1977	KIEV - radio	2,875.00
7/3/96	1978	Barkleigh Productions - Trade booth	492.50
7/3/96	1979	Dog Fancy - Adv'ting	6,596.00
7/19/96	2021	KFMB - FM - radio	2,875.00
7/19/96	2022	Viking Lithograph - labels	14,591.14
7/19/96	2025	Pet Health Supplied - T.V. Ad	365.50
7/19/96	2029	KABC - radio	1,350.00
7/19/96	2030	National Convention Photo - Adv'ting	120.18
7/19/96	2035	John Wright - radio	200.00
7/19/96	2037	KVEN - radio	1,036.80

Date	Ck #	Vendor/Purpose		Amount
7/24/96	2007	National Dog ? Assoc - Trade Show		420.00
7/26/96	2008	GES Expo Services - Trade Show		456.00
7/26/96	2054	KABC - radio		450.00
7/26/96	2058	M. Satterfield - KHOW - Radio		300.00
7/26/96	2066	Steve Teeple - Graphics		1,000.00
7/26/96	2075	St. Francis Productions - T.V. Ad		1,516.66
7/26/96	2076	Ray Masel - radio		600.00
8/2/96	2087	KABC - radio		450.00
8/2/96	2089	KIEV - radio		2,750.00
8/9/96	2111	Viking Lithograph - labels		5,982.63
		Subtotal Page 4		$?
8/9/96	2113	Animal World - radio	750.00	

Date	Ck #	Vendor/Purpose	Amount
8/9/96	2114	KFMB - radio	625.00
8/9/96	2124	KABC - radio	450.00
8/11/96	2129	Dog Fancy - Adv'ting	6,596.00
8/15/96	2142	Grandweb - website	1,490.00
8/15/96	2147	Viking Lithograph - labels	4,155.06
8/15/96	2153	KABC - radio	450.00
8/23/96	2170	WCKY - radio	200.00
8/23/96	2171	Steve Teeple - graphics	1,000.00
8/23/96	2172	KABC - radio	450.00
8/23/96	2181	Viking Lithograph - labels	9,597.06
8/23/96	2185	WBAP - radio	2,600.00
8/23/96	2186	Animal World - radio	600.00

Date	Ck #	Vendor/Purpose	Amount
8/29/96	2198	Viking Lithograph - brochures	3,581.51
8/29/96	2203	KABC - radio	450.00
8/29/96	2217	St. Francis Production s- T.V. Ad	1,516.66
8/29/96	2218	Ray Masel - radio	600.00
9/6/96	2226	KABC - radio	450.00
9/6/96	2227	Medical Corp. of America - radio	3,600.00
9/6/96	2228	Buckley Broadcasting - radio	1,000.00
9/6/96	2230	KIEV - radio	2,625.00
9/6/96	2232	Viking Lithograph - brochures	3,085.13
9/6/96	2237	Dog Fancy - Adv'ting	6,596.00
9/13/96	2251	Viking Lithograph - labels	7,532.85
9/13/96	2257	WBAP - radio	2,600.00

Date	Ck #	Vendor/Purpose	Amount
9/13/96	2260	KRMG - radio	400.00
9/13/96	2265	John Wright - radio	200.00
		Subtotal Page 5	$?
9/13/96	2269	KABC - radio	450.00
9/20/96	2282	KABC - radio	450.00
9/20/96	2277	Medical Corp. of America - radio	900.00
9/27/96	2312	St. Francis Productions - radio/TV	1,516.66
9/27/96	2313	KABC - radio	450.00
9/27/96	2314	Steven Teeple - graphics	1,079.98
9/27/96	2326	Animal World - radio	600.00
9/27/96	2328	Pet Health Supplies - WCKY - radio	200.00
10/4/96	2337	KABC - radio	450.00

Date	Ck #	Vendor/Purpose	Amount
10/4/96	2346	Viking Lithograph - labels	5,343.40
10/4/96	2349	KVEN - radio	950.40
10/10/96	2363	Viking Lithograph - labels/ brochures	3,795.00
10/10/96	2366	Tom Keller Photo - Product Pic's	658.16
10/10/96	2375	740 AM KRMG - radio	500.00
10/10/96	2380	WOR - Radio - "	2,500.00
10/10/96	2787	KABC - radio	450.00
10/18/96	2406	Viking Lithograph - graphics	270.63
10/18/96	2407	" " - brochures	1,649.13
10/18/96	2408	KIEV - radio	2,875.00
10/18/96	2414	Animal World - radio	750.00
10/21/96	2427	KMPC - radio	450.00

Date	Ck #	Vendor/Purpose	Amount
10/25/96	2438	Grandweb - website	990.00
10/25/96	2439	WBAP - radio	3,250.00
10/25/96	2444	Viking Lithograph - brochures/labels	3,538.22
10/25/96	2446	Tom Keller Photo - Product Pic's	464.39
10/25/96	2456	Kathy Henderson Enterprises - radio	750.00
11/1/96	2480	KABC - radio	450.00
		Subtotal Page 6	$?
11/8/96	2493	John Wright - radio	400.00
11/8/96	2496	Viking Lithograph - brochures	5,198.91
11/8/96	2501	KRMC - radio	400.00
11/8/96	2505	Steven Teeple -graphics	1,000.00
11/8/96	2517	KMPC - radio	450.00

Date	Ck #	Vendor/Purpose	Amount
11/15/96	2540	Grandweb – website	150.00
11/15/96	2548	B? Printing Co – brochures	244.64
11/22/96	2570	WBAP – AM – radio	2,600.00
11/22/96	2575	Viking Lithograph – labels	12,187.15
11/22/96	2577	H.H. Backer – Trade show	700.00
11/22/96	2585	Steven Teeple – graphics	1,030.00
11/22/96	2587	Animal World – radio	600.00
11/20/96	2518	WDR – radio	2,000.00
12/2/96	2603	Viking Lithograph – Print Ad	351.81
12/13/96	2656	Barbara Colonoso – video	77.70
12/17/96	2657	Viking Lithograph – labels	654.80
12/20/96	2706	" " – labels	22,653.00

Date	Ck #	Vendor/Purpose	Amount
12/20/96	2710	Grandweb - website	500.00
12/20/96	2713	Steven Teeple - graphics	1,000.00
12/23/96	2681	H.H. Backer Assoc - Trade show	650.00
12/27/96	2745	Viking Lithograph - brochures	3,500.81
		Subtotal Page 7	?
		Grand Total	?

EXHIBIT 15003

Good Will, Udo E. 5/18/01

From CVC	Date	CK. #	Vendor/Purpose	Amount
?				
✓	6/10/94	2888	Stacy Hauge - brochures	1,348.34
✓	10/24/94	3367	Alive Books - UDO's books	350.49
✓	7/5/94	4236	- Brochures	200.00
✓	7/11/95	4237	King Video - Adv'ting	1,240.00
✓	12/11/95	4756	The Broadcast Group -Adt'ing	804.00
✓	12/18/95	4773	WBAP - AM - advting, programming	2,100.00
✓	12/18/95	4774	Dr. Bob Martin - radio	250.00
✓	12/18/95	4775	Bob Mohan - radio	400.00
✓	12/18/95	4777	Doggie Tech - Adv'ting	260.00

CVC	Date	CK. #	Vendor/Purpose	Amount
✓	12/18/95	4778	740 AM KRMC - radio	400.00
✓	12/26/95	4810	Doggie Tech - Adv'ting	130.00
✓	1/8/96	4845	740 AM Radio, KAMG - radio	500.00
✓	1/22/96	4893	WBAP AM - radio	3,000.00
✓	1/22/96	4894	The Broadcast Group - radio	2,211.00
✓	2/5/96	4939	Doggie Tech -Adv'ting	130.00
✓	2/5/96	4941	WBAP AM - radio	2,850.00
✓	2/12/96	4963	Broadcast Group - radio	1,206.00
✓	2/12/96	4964	Broadcast Group - radio	804.00
✓	2/20/96	4986	Bob Mohan - radio	800.00
✓	2/20/96	4987	Bob Martin - radio	400.00
✓	3/4/96	5049	740 AM KRMC - radio	800.00

CVC	Date	CK. #	Vendor/Purpose	Amount
✓	3/11/96	5075	The Broadcast Group - radio	1,206.00
✓	3/11/96	5076	The Broadcast Group - radio	804.00
✓	3/25/96	5111	WBAP 820 - Radio	2,600.00
✓	4/15/96	5186	Broadcast Group	2,211.00
✓	4/15/96	5187	Doggie Tech - Adv'ting	130.00
✓	4/15/96	5188	WBAP 820 - radio	3,250.00
✓	4/15/96	5191	740 AM KRMG - radio	400.00
✓	4/29/96	5235	Bob Mohan - radio	1,000.00
✓	4/26/96	5236	Bob Martin - radio	450.00
✓	5/6/96	5288	Broadcast Group - radio	2,010.00
✓	5/13/96	5290	WBAP AM - radio	2,600.00
✓	5/20/96	5312	Doggie Tech - Adv'ting	130.00

CVC	Date	CK. #	Vendor/Purpose	Amount
✓	5/20/96	5313	740 AM KRMC - radio	400.00
✓	6/10/96	5394	Bob Mohan - KFYI - radio	400.00
✓	6/10/96	5396	WBAA News - Talk 820 - radio	2,600.00
✓	6/17/96	5414	The Broadcast Group - radio	2,010.00
✓	6/17/96	5415	740 AM, KRMC - radio	400.00
✓	4/15/96	5190	John Wright - radio	600.00
✓	6/10/96	5396	John C. Wright - radio	200.00
✓	6/24/96	5438	John C. Wright, 740 AM - radio	200.00
✓	6/24/96	5439	Bob Martin KFYI - radio	450.00
✓	6/24/96	5440	Doggie Tech - Adv'ting	120.00
✓	7/8/96	5494	John Wright - radio	200.00
✓	7/16/96	5514	Bob Mohan - radio	400.00

CVC	Date	CK. #	Vendor/Purpose		Amount
✓	7/10/96	5515	WBAP News Talk 20 - radio		3,250.00
✓	7/22/96	5516	740 AM - radio		219.41
✓	7/22/96	5517	740 KRMC - radio		500.00
✓	7/22/96	5543	The Broadcast Group - radio		2,211.00
✓	7/22/96	5544	Doggie Tech - Adv'ting		120.00
✓	8/20/96	5641	Doggie Tech - Avt'ing		30.00
✓	12/9/96	6020	Alive - Tour		3,003.26
				Grand Total	$54,2??.??

EXHIBIT 15004

Good Will - Udo E. - From JHI 5/18/01
(1998 Thru March)

Date	CK. #	Vendor/Purpose	Amount
1/13/98	4468	Ohio Vet. Med. Assoc. - Trade Show	950.00
1/13/98	4470	N. American Trade Show - " "	296.12
1/23/98	4505	H.H. Backer - " "	1,200.00
1/27/98	4521	AAHA - " "	1,545.00
2/6/98	4546	Viking Lithograph - brochures	1,502.00
2/6/98	4554	Natural Products Expo West - Trade Show	975.00
2/13/98	4593	GES Exposition Services - " "	647.00
2/19/98	4623	Viking Lithograph - brochures	4,314.76
2/19/98	4648	Tom Keller Photo - Product Photos	1,007.81
3/12/98	4714	Viking Lithograph - labels	8,272.50
			$?

5/18/01

Payments to Udo E. - From Petscriptions

Date	CK. #	for	Amount
8/14/95	992	consulting	$3,709.63
6/19/95	790	"	3,035.79
10/9/95	1063	"	1,000.00
10/12/95	1073	"	1,500.00
10/18/95	1087	"	1,667.00
10/23/95	1119	"	3,861.00
~~—?—~~	~~1120~~	"	
11/20/95	1209	"	4,489.00
12/15/95	1279	"	4,322.00
~~1/16/?~~			
1/16/96	1366	"	4,200.50

Date	CK. #		for		Amount
2/15/96	1465		"		3,286.90
3/08/96	1570		"		5,100.13
3/14/96	1588		"		2,471.96
3/22/96	1642		"		1,000.00
(4/17/96	1665	These made to	?)	13,000	
(4/29/96	1668	Designing Health - but could be transfers	?)	15,000	
(5/8/96	1671	to DHI, not Udo	?)	10,000	
(7/19/96	1674		)	9,107.57	
4/12/96	1643		consulting		2,551.89
5/17/96	1763		"		3,579.23
6/25/96	1931		"		3,407.00
7/19/96	2044		"		2,409.73
8/15/96	2154		"		3,647.23

Payment to Udo E - from JHI
(on behalf of ˆ)

5/18/01

Date	CK #	for	Amount
9/13/96	2261	?	246.26
10/4/96	2357	consulting	3,435.05
10/25/96	2463	"	4,449.90
11/8/96	2516	"	3,721.50
11/13/96	2532	"	3,721.50
12/6/96	2640	?	50.00
12/13/96	2679	consulting	3,775.30
12/18/96	2691	Apt'mt deposit	100.00
5/29/96	1810	Apt'mt Credit application	15.00
8/23/96	2176	Cleaning/Udo Apt	120.00
10/7/96	2242	" / " "	120.00

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Date	CK #		for	Amount
12/30/96	2723	" / " "		120.00
1/10/97	2789	" / " "		220.00
1/17/97	2828	consulting		2,605.64
2/3/97	2864	Apt. Cleaning/udo		220.00
2/7/97	2907	consulting		3,685.21
3/5/97	3004	"		3,836.07
3/7/97	3001	Apt/Cleaning - Udo		220.00
3/28/97	3111	consulting		4,050.00
4/4/97	3116	books for Udo		61.50
4/4/97	3129	Udo speeding ticket		76.00
4/7/97	3136	cleaning/udo Apt'mt		220.00
5/5/97	3264	" " "		220.00
5/9/97	3265	consulting		3,466.32

Date	CK #		for	Amount
5/16/97	3323	Udo personal phone		41.64
6/2/97	3406	Udo - cleaning Apt		220.00

EXHIBIT 16000-9

EXHIBIT NO. 41

SALES OF PET PRODUCTS - 1993

Month	Bates No.	Sales
January	006400	$ 0
February	006401	0
March	006402	0
April	006403	0
May	006404	0
June	006405	0
July	006406	0
August	006407	0
September	006408	0
October	006409	$ 979.90
November	006410	$ 5,734.79
December	006411	$ 5,555.41
TOTAL 1993 PET PRODUCT SALES:		**$ 12,270.10**

EXHIBIT 16000-10

SUMMARY 1994

EXHIBIT NO. 13017
(March, April and May)
(Bates 020858, 020860 and 020863)

and

EXHIBIT NO. 13016
(June through December)
(Bates 020883 to 020894)

Month	Bates Nos.	Total Sales
March	020858	$7,629.40
April	020860	$5,669.82
May	020863	$6,641.75
June	020883	$6,496.05
July	020884	$9,759.30
August	020885 to 020886	$9,152.64
September	020887 to 020888	$21,877.85
October	020889 to 020890	$20,811.35
November	020891 to 020892	$22,277.75
December	020893 to 020894	$15,728.85
TOTAL 1994 SALES (March-December):		**$126,044.76**

EXHIBIT 16000-11

EXHIBIT NO. 13013
(Bates 020898 to 021140)

SUMMARY 1995

Month	Bates Nos.	Total Sales
January	020899 to 020901	$31,298.95
February	020902 to 020905	$38,229.50
March	020906 to 020909	$52,715.50
April	020910 to 020914	$44,046.65
May	020915 to 020919	$53,164.50
June	020920 to 020925	$66,817.00
July	020926 to 020933	$64,091.70
August	020934 to 020939A	$75,803.50
September	020940 to 020944	$61,755.20
October	020945 to 020952	$68,851.25
November	020953 to 020960	$74,434.47
December	020898	$95,077.93
TOTAL 1995 SALES:		**$725,786.15**

EXHIBIT 16000-12

EXHIBIT NO. 13013
(Bates 020898 to 021140)

SUMMARY 1996

Month	Bates Nos.	Total Sales
January	021131 to 021140	$107,137.65
February	021121 to 021130	$133,793.50
March	021099 to 021108	$143,382.90
April	021109 to 021119	$147,032.10
May	021085 to 021097	$148,864.60
June	021074 to 021083	$159,800.95
July	021058 to 021067	$181,714.35
August	021041 to 021050	$136,002.55
September	021027 to 021037	$184,682.90
October	021008 to 021021	$199,888.80
November	020991 to 021003	$154,038.80
December	020970 to 020981	$225,672.75
TOTAL 1996 SALES:		**$1,922,011.70**

Payments to Udo - From DH - 5/18/01
(on behalf of)

Date	CK #	for	Amount
6/3/97	3410	consulting	4,012.39
6/25/97	3516	"	1,906.95
7/4/97	3583	Udo apt'mt cleaning	255.00
7/18/97	3637	Udo personal phone	42.48
7/18/97	3638	Udo apt'mt cleaning	110.00
7/25/97	3664	" " "	255.00
7/30/97	3688	consulting	2,981.06
8/22/97	3802	Udo personal phone	96.87
8/22/97	3812	Paym't to Attorney - Udo sexual harassment	1,161.19
8/29/97	3842	Udo Apt'mt cleaning	255.00
9/12/97	3909	payment for human service expert ?	1,200.00

Date	CK #	for	Amount
?	?	?	
9/19/97	3937	consulting	1,701.08
9/26/97	3974	cleaning apt'mt - Udo	255.00
10/10/97	4045	consulting	4,350.00
10/24/97	4112	paym't to Attorney - Udo harassment	213.01
?	?	?	?
?	?	?	?
11/21/97	4264	paym't to Attorney - Udo harassment	77.50
11/25/97	4311	Udo apt'mt cleaning	255.00
12/19/97	4405	" " "	382.50
12/26/97	4437	attorney - Udo harassment	148.50

Date	CK #		for		Amount
1/29/97	4536	cleanintg - Udo apt'mt			255.00
3/12/97	4724	final " - " "			318.75
				Grand Total	$114,56?.??

Payments to CVC - R & D Partnership 5/??/01

Date	CK #	Purpose	Amount
12/27/96	2728	Royalty	1,500.00
1/30/97	2882	"	1,500.00
3/28/97	3112	"	1,500.00
4/30/97	3243	"	1,500.00
5/29/97	3364	"	1,500.00
6/27/97	3518	"	1,500.00
8/1/97	3722	"	1,500.00
8/29/97	3831	"	1,500.00
9/26/97	3984	"	1,500.00
10/30/97	4134	"	1,500.00
11/25/97	4290	"	1,500.00
		?	?

Payments from DAJ to CVC

CK #	Date		Amount
201	6/13/94	CVC (pay'mt)	1,348.34
211	6/24/94	CVC (")	40.00
179	5/17/94	CVC (")	48.79
134	3/21/94	CVC (")	117.67
1591	3/11/96	Petscriptions (")	11,500.00
1648	4/16/96	?HICK (")	6,678.30
1933	7/10/96	" "	500.00
1991	7/11/96	" "	10?.00
			$?

EXHIBIT 16000-13

EXHIBIT NO. 13003
(Bates 020116 to 020115)

SUMMARY 1997

Month	Bates Nos.	Total Sales
January	020116 to 020131	$173,471.00
February	020135 to 020149	$196,101.90
March	020152 to 020171	$188,349.05
April	020172 to 020192	$237,919.05
May	020193 to 020214	$255,606.94
June	020215 to 020237	$231,953.94
July	020238 to 020260	$284,887.20
August	020262 to 020283	$236,367.15
September	020284 to 020307	$318,415.15
October	020308 to 020328	$326,433.95
November	020332 to 020352	$220,773.35
December	020353 to 020375	$207,438.65
TOTAL 1997 SALES:		**$2,877,717.33**

APPENDIX P

USDC DN 1056

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CHRISTINE COVERDALE, ESQ (SBN: 195635)
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Attorneys for Plaintiffs and Counterdefendants,
DESIGNING HEALTH, INC.,
DR. ROBERT COLLETT, and BERNARD COLLETT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 98-4758 GPS (Cwx)

[Filed October 7, 2005]

DESIGNING HEALTH, INC., a Colorado corporation, et al.,
Plaintiffs,

v.

UDO Erasmus, an individual, et al.,
Defendants.

AND RELATED CLAIMS.)

MEMORANDUM IN SUPPORT OF MOTION FOR A NEW TRIAL ON DAMAGES OR, IN THE ALTERNATIVE, FOR A NEW TRIAL AS TO UDO ERASMUS

Date: November 7, 2005
Time: 1:30 p.m.
Place: Before the Honorable George P. Schiavelli, United States District Court Judge

EXHIBIT 16,000-9

EXHIBIT NO. 41

SALES OF PET PRODUCTS - 1993

Month	Bates No.	Sales
January	006400	$ 0
February	006401	0
March	006402	0
April	006403	0
May	006404	0
June	006405	0
July	006406	0
August	006407	0
September	006408	0
October	006409	$ 979.90
November	006410	$ 5,734.79
December	006411	$ 5,555.41
TOTAL 1993 PET PRODUCT SALES:		$ 12,270.10

EXHIBIT 16,000-10

CASE NO 98-4758 LGB (CWx)
DESIGNING HEALTH, ET AL.
vs. UDO ERASMUS, ET AL.
PLAINTIFF'S EXHIBIT 16,000-10
DATE _____

IDEN.

DATE _____

EVID.

BY _____
Deputy Clerk

AO 386

SUMMARY 1994

EXHIBIT NO. 13017
(March, April and May)
(Bates 020858, 020860 and 020863)

and

EXHIBIT NO. 13016
(June through December)
(Bates 020883 to 020894)

Month	Bates Nos.	Total Sales
March	020858	$7,629.40
April	020860	$5,669.82
May	020863	$6,641.75
June	020883	$6,496.05

Month	Bates Nos.	Total Sales
July	020884	$9,759.30
August	020885 to 020886	$9,152.64
September	020887 to 020888	$21,877.85
October	020889 to 020890	$20,811.35
November	020891 to 020892	$22,277.75
December	020893 to 020894	$15,728.85
TOTAL 1994 SALES (March - December):		$126,044.76

EXHIBIT 16,000-11

EXHIBIT NO. 13013
(Bates 020898 to 021140)

SUMMARY 1995

Month	Bates Nos.	Total Sales
January	020899 to 020901	$31,298.95
February	020902 to 020905	$38,229.50
March	020906 to 020909	$52,715.50
April	020910 to 020914	$44,046.65
May	020915 to 020919	$53,164.50
June	020920 to 020925	$66,817.00
July	020926 to 020933	$64,091.70
August	020934 to 020939A	$75,303.50
September	020940 to 020944	$61,755.20
October	020945 to 020952	$68,851.25
November	020953 to 020960	$74,434.47
December	020898	$95,077.93
TOTAL 1995 SALES		$725,786.15

EXHIBIT 16,000-12

EXHIBIT NO. 13013
(Bates 020898 to 021140)

SUMMARY 1996

Month	Bates Nos.	Total Sales
January	021131 to 021140	$107,137.65
February	021121 to 021130	$133,793.50
March	021099 to 021108	$143,382.90
April	021109 to 021119	$147,032.10
May	021085 to 021097	$148,864.60
June	021074 to 021083	$159,800.95
July	021058 to 021067	$181,714.35
August	021041 to 021050	$136,002.55
September	021027 to 021037	$184,682.90
October	021008 to 021021	$199,888.80
November	020991 to 021003	$154,038.80
December	020970 to 020981	$225,672.75
TOTAL 1996 SALES:		$1,922,011.70

EXHIBIT 16,000-13

EXHIBIT NO. 13003
(Bates 020116 to 020115)

SUMMARY 1997

Month	Bates Nos.	Total Sales
January	020116 to 020131	$173,471.00
February	020135 to 020149	$196,101.90
March	020152 to 020171	$188,349.05
April	020172 to 020192	$237,919.05
May	020193 to 020214	$255,606.94
June	020215 to 020237	$231,953.94
July	020238 to 020260	$284,887.20
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September	020284 to 020307	$318,415.15
October	020308 to 020328	$326,433.95
November	020332 to 020352	$220,773.35
December	020353 to 020375	$207,438.65
TOTAL 1997 SALES:		$2,877,717.33

000756

Ex. 13,010A

INVESTMENT BY CVC
INTO DH 1992-1994: $300,090.79

Ex. 13,010B

INVESTMENT BY CVC
INTO DH 1993-1997: $181,940.41

TOTAL: $482,031.10

000757

DH SALES
16000-9 TO 16000-13

1993 (16000-9)	$12,270.00
1994 (16000-10)	126,044.00
1995 (16000-11)	725,786.00
1996 (16000-12)	1,927,011.00
1997 (16000-13)	2,877,717.00

000758

TOTAL SALES
OCT. 1993 – MAR. 30, 1996
Exs. 16000-9 to 16000-12

	$1,244,000.00
HUMAN	310,000.00
PET	934,000.00

000759

EX 14001

FLORA, LTD. PURCHASES FROM DH

1996

MONTH	HUMAN SALES
OCTOBER	$ 7,800.00
NOVEMBER	11,700.00
DECEMBER	7,800.00
TOTAL	$ 27,300.00

000760

EX. 14001

FLORA, LTD. PURCHASES FROM DH

1997

MONTH		HUMAN SALES
JANUARY	$	0.00
FEBRUARY	$	7800.00
MARCH	$	0.00
APRIL	$	7800.00
MAY	$	11,700.00
JUNE	$	0.00
JULY	$	11,700.00
AUGUST	$	0.00
SEPTEMBER	$	11,700.00
OCTOBER	$	21,996.00
NOVEMBER	$	11,700.00
DECEMBER	$	0.00
TOTAL:	$	84,396.00

000761

EX. 14001 Pg. 2

1997 SALES TO FLORA LTD.:	$ 84,396.00
1997 SALES TO FLORA INC.:	$181,170.00

EX. 14246A
(DH (ACCTS. REC.))

DEC. 29, 1997

FLORA CANADA (PAST DUE)	$40,089.00
FLORA U.S. (PAST DUE)	$37,360.00

000778

DH PAYMENTS TO PROMOTE
UDO ERASMUS (1994-1997)

EX.	15,000-2	$328,685.00
	15,000-3	54,233.00
	15,000-4	20,000.00
		$402,818.00

DH PAYMENTS TO UDO ERASMUS
1992–1997

EX. 395 AND 13,012	$220,000.00
	25,818.00
	$245,818.00

DH COST TO CHANGE LABELS 1998

EX. 15,000-1	$42,932.16

?

FLORA, INC.
1998 (PRODUCTION MANAGER)

UDO'S CHOICE WHOLESOME FAST FOOD BLEND

APRIL 30, MAY 30, 1998	3590	16 oz.
	2817	8 oz.
MAY 15, 1998	RAN OUT OF LABELS	
JULY-AUGUST 1998	3410	16 oz.
	2969	8 oz.
SEPT.-NOV. 1998	6308	16 oz.
	9279	8 oz.
DECEMBER 1998	960	16 oz.
TOTAL 8 MO. 1998	14,268	16 oz.
	15,065	8 oz.

?

EXS. NO. ? - ?

FLORA USA ?
UDO'S CHOICE WHOLESOME FAST FOOD BLEND

EX. 503A [THE BOTTLE]

1998	$ 162,424.00
19[illegible]	227,370.00
2000	290,110.00
TOTAL USA:	$ 679,904.00

FLORA CANADA 14002-5

1998	$ 32,775.00
1999	133,133.00
2000	103,829.00
TOTAL CANADA:	$ 269,739.00

1998 -2000
HUMAN

(1) TOTAL: $949,641.00

?

1998 -2000 TOTAL PET (US ONLY)

(2) EX. NO. 14002-2: $187,635.00

1998 -2000 HUMAN TOTAL EXPORT

(3) EX. NO. 14002-3, 14002-4:

$ 66,020.00

TOTAL: $1,203,296.00

APPENDIX Q

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DESIGNING HEALTH, INC.,
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 98-4758 LGB (CWx)

AMENDED BASIS UPON WHICH EXHIBITS IDENTIFIED BY MARY ANN RENSING AND CERTAIN OTHER EXHIBITS SHOULD BE ADMITTED

Date: October 16, 2002
Time: 8:00 a.m.
Place: Before the Honorable Lourdes G. Baird,
U. S. District Court
Judge Presiding

DESIGNING HEALTH, INC., a Colorado corporation, et al., Plaintiffs,	)
v.	)
UDO ERASMUS, an individual, et al., Defendants.	)
AND RELATED CLAIMS.	)

I.

INTRODUCTION

Federal Rule of Evidence, Rule 1006, "Summaries," provides, in part:

> "The contents of voluminous writings,...which cannot be examined in court may be presented in the form of a chart, summary or calculation." "The original, or duplicates shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court."

11 Moore's Federal Practice, Chapter 1005.02, as to rule

* * * * *

APPENDIX R

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Defendants THOMAS GREITHER and
GABRIEL LIGHTFRIEND

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

CASE NO. 98-47.58 LGB (Cwx)

[Filed October 15, 2002]

DESIGNING HEALTH, INC., a Colorado corporation, et al.,
Plaintiffs,

v.

UDO ERASMUS, an individual, et al.,
Defendants.

AND RELATED COUNTERACTIONS

[Honorable Lourdes G. Baird]

THE FLORA PARTIES' OBJECTIONS TO PLAINTIFFS' EXHIBIT NOS. 843, 844, 846, 847, 13000, 13001, 13003, 13005, 13007, 13013, 13016, 13017, 14002, 14246

TO: THE COURT:

Pursaunt to the Court's request on Friday, October 11, 2002,

* * * * *

APPENDIX S

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Defendant Udo Erasmus

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. 98-4758 LGB (CWx)

[Filed October 15, 2002]

DESIGNING HEALTH, INC., a Colorado corporation, et al.,
Plaintiffs,

v.

UDO ERASMUS, an individual, et al.,
Defendants.

AND ALL RELATED CLAIMS.

DR. ERASMUS' OBJECTIONS TO CERTAIN EXHIBITS OFFERED BY PLAINTIFFS

Required Filing Date: October 15, 2002

Trial in Process

Hon. Lourdes G. Baird,
United States District Judge.

Defense counsel has not heard as of this writing from plaintiffs' counsel respecting the following documents which plaintiffs offer but defendants oppose on the ground of relevance:

Ex. 843: 183 obviously and improvidently redacted pages of check register with room for 41 entries per page. Plaintiffs' counsel represented that he only intended to rely upon a few pages. Dr. Erasmus'

counsel asked plaintiffs' counsel on the record to identify what pages he intended to rely

* * * * *

000779

DH
HUMAN SALES
EXS. 14201 & 850

YEAR	DH	FINC.	FCAN	TOTAL
1995	200,000.00	-0-	-0-	200,000.00
1996	584,000.00	103,000.00	273,000.00	714,000.00
1997	523,000.00	209,000.00	84,396.00	816,000.00
1998	342,000.00	-0-	-0-	342,000.00
1999	532,000.00	-0-	-0-	532,000.00
2000	482,000.00	-0-	-0-	482,000.00

APPENDIX T

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and Counter-Defendants, COLLETT VETERINARY
CLINIC, and COLLETT FAMILY TRUST

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. 98-4758 LGB (CWx)

DESIGNING HEALTH, INC., a Colorado corporation, et al.; DR. ROBERT MACINTOSH COLLETT, an individual; BERNARD COLLETT, an individual, Plaintiffs,	)
v.	)

UDO ERASMUS, an individual, et al.;)
FLORA, INC., a Washington corporation;)
FLORA MANUFACTURING AND)
DISTRIBUTING, LTD., a corporation)
chartered under the laws of Canada;)
THOMAS GREITHER, an individual;)
GABRIEL LIGHTFRIEND, an individual,)
Defendants.)
_____)
)
AND RELATED CLAIMS.)
_____)

FIFTH AMENDED AND SUPPLEMENTAL COMPLAINT FOR:

1. **BREACH OF FIDUCIARY DUTY**
2. **INTENTIONAL MISREPRESENTATION**
3. **BREACH OF CONTRACT**
4. **FEDERAL UNFAIR COMPETITION**
5. **UNFAIR COMPETITION (STATE STATUTORY AND COMMON LAW)**
6. **RESCISSION**
7. **MISAPPROPRIATION OF CONFIDENTIAL INFORMATION**
8. **DECLARATORY RELIEF AS TO OWNERSHIP OF PATENT**
9. **PATENT INFRINGEMENT**
10. **SLANDER OF TITLE**
11. **DECLARATORY RELIEF**

(DEMAND FOR JURY TRIAL)

* * * * *

APPENDIX U

03-1438, -1439, -1440, -1441, -1442, -1443, -1457

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DESIGNING HEALTH, INC., Plaintiff-Cross Appellant,

and
BERNARD COLLETT and
ROBERT MACINTOSH COLLETT,
Plaintiffs/Third Party Defendants-Cross Appellants,

and
COLLETT VETERINARY CLINIC, INC. and
COLLETT FAMILY TRUST,
Third Party Defendants-Appellees,

v.
UDO ERASMUS,
Defendant/Third Party Plaintiff-Appellant,

and
FLORA, INC., FLORA MANUFACTURING AND
DISTRIBUTING LTD., THOMAS GREITHER, and
GABRIEL LIGHTFRIEND,
Defendants-Appellants,

APPEALS FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

IN CONSOLIDATED Case Nos.
98-CV-4758 AND 98-CV-9088,
JUDGE LOURDES G. BAIRD

BRIEF OF DEFENDANTS-APPELLANTS FLORA, INC., FLORA MANUFACTURING AND DISTRIBUTING, LTD., AND THOMAS GREITHER

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Attorneys for Defendants-Appellants

November 21, 2003

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* * * * *

APPENDIX V

Appeal Nos. 03-1438, 03-1439, 03-1440, 03-1441,
03-1442, 03-1443, 03-1457

UNITED STATES COURT OF APPEALS
for the
FEDERAL CIRCUIT

DESIGNING HEALTH, INC.,

Plaintiff-Cross-Appellant,

— and —

BERNARD COLLETT and
ROBERT MACINTOSH COLLETT,

Plaintiffs/Third-Party
Defendants/Cross-Appellants,

— and —

COLLETT VETERINARY CLINIC, INC, and
COLLETT FAMILY TRUST,

Third-Party Defendants-Appellees,

— against —

UDO ERASMUS,

Defendant/Third-Party Plaintiff-Appellant,

- and -

FLORA, INC., FLORA MANUFACTURING AND DISTRIBUTING, LTD., THOMAS GREITHER and GABRIEL LIGHTFRIEND,

Defendants-Appellants.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

IN CONSOLIDATED CASE NOS.
98-CV-4758 AND 98-CV 9088,

JUDGE LOURDES G. BAIRD

CORRECTED BRIEF OF DEFENDANT/THIRD-PARTY PLAINTIFF-APPELLANT

JOHN M. BURNS, III
Attorney for Defendant/Third-Party Plaintiff-Appellant
33 Greenwich Avenue
New York, New York 10014
(212) 360-1990

* * * * *

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* * * * *

APPENDIX W

EXCERPTS OF CORRECTED RESPONDING AND OPENING BRIEF

[Filed March 30, 2004]

03-1438, -1439, -1440, -1441, -1442, -1443, -1457

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DESIGNING HEALTH, INC.,
Plaintiff-Cross-Appellant
and
BERNARD COLLETT and
ROBERT MACINTOSH COLLETT,
Plaintiffs/Third Party Defendants-Cross Appellants,
and
COLLETT VETERINARY CLINIC, INC. and
COLLETT FAMILY TRUST,
Third Party Defendants-Appellees,
v.
UDO ERASMUS,
Defendant/Third Party Plaintiff-Appellant,
and
FLORA, INC., FLORA MANUFACTURING AND
DISTRIBUTING, LTD., THOMAS GREITHER and
GABRIEL LIGHTFRIEND,
Defendants-Appellants.

Appeals from the United States District Court
for the Central District of California
in consolidated case nos. 98-CV-4758 and 98-CV-9088,
Judge Lourdes G. Baird

CORRECTED RESPONDING AND OPENING BRIEF OF DESIGNING HEALTH, INC., BERNARD COLLETT, ROBERT MACINTOSH COLLETT, COLLETT VETERINARY CLINIC, INC., AND COLLETT FAMILY TRUST

Allen Hyman, Esq.
Law Offices of Allen Hyman
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Attorneys for PLAINTIFF-CROSS
APPELLANTS, AND APPELLEES

March 30, 2004

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* * * * *

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* * * * *

> "Dear Mr. Hyman:" "Enclosed as a joint production on behalf of all defendants bearing Bates stamp numbers 400000 through 400162 are copies of (1) 'Monthly summary of Flora companies sales...' (2) Part of Flora companies monthly royalty reports to Udo Erasmus...."

At the second page of the letter (A48001), FP's counsel states:

> "Except as explained in paragraph number '3' above, data which is not responsive to the Magistrate Judge's Order has been redacted." (Emphasis added).

The 14000 series to which both UE and the FP object Exs. 14002-1 to 14002-5 (A32364 to A 32368), are the precise pages (with the FP's May 24, 2001 referenced Bates stamped numbers (400107-40111), which the FP and UE produced by cover letter of May 24, 2001, in compliance with the Magistrate Judge's Order (A12062).

Neither the FP nor do UE demonstrate how the DC in admitting documents represented by the FP's counsel to comply with the Magistrate Judge's May 11, 2001 Order after discovery, which documents the FP's counsel presented on May 24, 2001 (NAEx. A48000) seventeen months prior to trial, was an abuse of the Court's discretion.

The 15000 Series

On October 7, 2001, on the seventh day of trial, two weeks prior

* * * * *

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to the Court's October 22, 2002 Order (A19800), DHI calls Mariann Murdock-Lourie ("MM") (A29916:7).

MM is DHI and CVC's accountant (A29916:21-24), who created all financial statements, sales, inventory, accounts payable, receivable ledgers and check registers, all routinely in the ordinary course of business with daily entries by MM or those under her supervision. (A29918:1-7).

On October 7, 2003, MM authenticates and established foundation for numerous accounting exhibits and summaries of those records.

On October 7, 2003, UE and the FP object, based on relevance as to all DHI accounting documents.

DHI Sales Data

1. NAEx. 13013 (A42846-A43089), DHI sales foundation (A29921:12-25 to A29922:1-4), (A42846), (A29922:14-25) and (A29923:1-3), (UE relevance objection) (A29923:10). "The Court: We'll take care of it at the break Mr. Hyman.") (A29922:5-10).

2. NAEx. 13016 DHI sales (A43290-A43301), foundation (A29923:20-25 to 29924:1-3); UE and FP object relevance (A29924:3-6).
* * * * *

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3. NAEx. 13003 (A41652-41912), DHI sales, foundation (A29926:1-4); UE and FP object, relevance (A29927:19-25).

4. NAEx. 13000 (A40897-41055), DHI sales foundation (A29933:3-24) UE and FP object, relevance (A29933:25 to 29934:1).

DHI Check Registers

5. NAEx. 13001 (A41256-41051) foundation (A29925:2-11) (UE "relevance") (A29925:13).

6. NAEx. 13005 (A42113-42122), foundation (A29928:2-16), UE relevance (A29928:18).

7. NAEx. 13007 (A42323-A42391), foundation (A229929:1-5), (UE and FP, relevance) (A29929:6-8).

8. NAEx. 843 (A40,000-A40,183), foundation (A29929:10-24) (UE and FP, relevance) (A29930:9-10).

9. NAEx. 844, foundation (A29930:12 to 29931:6). (UE, relevance) (A29931:7-12).

10. NAEx. 846 (A40384-40427), foundation (A29931:13-23), (A29931:14-25 to 29932:1-3) (UE, FP objection, relevance) (A29932:4-7).
* * * * *

DHI Summary Exhibits

11. On October 7, 2002, DHI places summary exhibits, Ex. Nos. 16010.-11.-12.-13 (A29950:12-13) (UE "irrelevant.") (A29950:23-25), NAEx. 13016 and 13017, (UE and FP object, relevance) (A19951:11-25).

12. Ex. 15002 (A32473-A32443) is a compilation of direct expenditures by DHI that were made to promote the goodwill of UE on DHI promotional material, (BC, A30319:20-25), which is in BC's handwriting. (BC, A30302:1-2). BC used Exhibit 130000 to create 15002 (A30320:2-25). (Objection, relevance, A30321:12 to 17).

On October 7, 2002, both the FP and UE interposed repeated objections based upon relevance, delaying the Court's ruling as to admissibility preventing DHI from presenting summaries prior to close of evidence based upon October 7, 2002 accounting records.

The FP and UE do not indicate any claim of inaccuracy of any of the exhibits, and have not demonstrated how the FP's and UE's continuing objections as to relevance, which caused delay in the Court's ruling of admissibility after the October 7, 2003 presentation of foundation was an abuse of the Court's discretion.

APPENDIX X

CV 98-4758-GPS

EXCERPTS OF TRANSCRIPT

[November 14, 2005]

UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

HONORABLE GEORGE P. SCHIAVELLI
UNITED STATES DISTRICT JUDGE PRESIDING

DESIGNING HEALTH, INC.,	)
PLAINTIFF,	)
	)
VS.	)
	)
UDO ERASMUS, ET AL.,	)
DEFENDANTS.	)
	)

REPORTER'S TRANSCRIPT OF MOTIONS HEARING

NOVEMBER 14, 2005

LOS ANGELES, CALIFORNIA

ROSALYN ADAMS, CSR 11794
OFFICIAL COURT REPORTER
312 NORTH SPRING STREET, ROOM 410
LOS ANGELES, CALIFORNIA 90012
PH: (213)894-2665

* * * * *

Therefore, from their standpoint, all they had was all or nothing on this and they said okay, fine; reverse the denial of the M.O.L., which means to me, grant the M.O.L..

MR. HYMAN: I don't know if they would have responded. You know, we did ask for clarification.

THE COURT: I understand that. And I don't know what was in the question for clarification, in the rehearing, but I suspect, as I understand it, it was not all of the arguments that have been made here in terms of the evidence that was not admitted.

MR. HYMAN: Right. With the limited time and the limited material –

THE COURT: But that, too, has been dealt with in the cases, where there was -- in one of the cases, and I think it was -- if I remember correctly --

MR. HYMAN: *Weisgram.*

THE COURT: It was in *Weisgram* that the court noted that the time in which to file a petition for rehearing is ample to re-raise these issues. It recognizes -- the argument had been made there that that wasn't sufficient time; the court said yes, it is.

MR. HYMAN: Yeah. And that, again, was with regard to liability and here, it was a foundational one.

But the court then -- I'd like to go on to the next thing. The court finds, if the court does have discretion,

* * * * *

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The court still would not -- I guess that's the other issue.

THE COURT: Part of the reason for that is, it seems to me, as having some detailed experience in appellate work, that your first prong is to say that the evidence below was excluded and that that was error. That issue should go to the circuit court.

If the circuit court says yeah, it looks like it could have been error or it was error, then it sends it back to say: maybe a new trial. That should have been raised there. That's simply you're saying there was error in the trial below.

Second, the cases hold -- let me finish.

The cases say that part of the reason that a circuit court might want to send it back is, of course, that the trial judge has had experience with the case.

The trial judge here is no longer here. I don't have any more experience with this case than the federal circuit did. Therefore, there's no reason for me -- any more reason for me to interpose my discretion than there would have been for the federal circuit.

So for both reasons, I'm not going to second guess or reverse the orders that were made by Judge Baird. That was the job for the federal circuit, had it been raised before them. It wasn't.

Had they looked at it and said we think there was

* * * * *

(2)

No. 07-34

Supreme Court, U.S.
FILED
AUG 08 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DESIGNING HEALTH, INC.,

Petitioner,

v.

UDO ERASMUS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT UDO ERASMUS

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This brief is submitted on behalf of Respondent Udo Erasmus ("Erasmus") in opposition to the Petition for Writ of Certiorari ("Petition") herein for the purposes of: (a) preserving Erasmus' objections to consideration of questions presented based on what occurred in the proceedings below, and (b) identifying misstatements appearing in the Petition, each as suggested by Supreme Court Rule 15.2.

In view of the two well-reasoned opinions (App. A and E at 1a and 21a) of the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), which establish the absence of any compelling reason for this Court to grant certiorari, we do not address that issue.

PETITIONERS WAIVED THEIR PRESENT CONTENTIONS

Petitioners failed timely to assert the contentions which they now seek to assert in the Petition.

On the 12th day of trial, October 22, 2002, all parties, including Petitioners, rested without reservation. (App. O at 219a-220a) Petitioners did not complain of outstanding evidence issues at the time the parties rested.

Shortly thereafter on the same day, the trial court issued its ruling (App. N, 130a-131a) which admitted certain exhibits offered by Petitioners and rejected others. Petitioners did not complain then, or at any time before, or even during, jury deliberations (which started after October 24 [see App. O at 220a-221a]), that any testimony had been foreclosed by the timing of the trial court's ruling.

Petitioners did not make that complaint in their first appeal (App. A at 5a). Indeed, Petitioners argued on that appeal that any delay in admitting documents was not shown to be "an abuse of the Court's discretion" (App. W at 337a; cf. Pet. p. 5). In its June 1, 2005 Decision (App. E at 21a et

seq.) on the first appeal, the Federal Circuit fully analyzed the evidence of damages, reversed the damages awards, reversed the trial court's denial of JMOL and issued no instructions (App. E at 23a-24a, 34a, 36a, 37a), thereby giving notice that the trial court lacked authority to act further respecting evidence of damages. *Tronzo* v. *Biomet, Inc.*, 236 F.3d 1342, 1348 (Fed. Cir. 2001); *Engel Industries, Inc.* v. *Lockformer Co.*, 166 F.3d 1379, 1382 (Fed. Cir. 1999).

Petitioners motion for rehearing (App. G at 41a et seq.) neither complained of the timing of the trial court's evidentiary ruling nor indicated the existence of any evidence which the Federal Circuit had not already reviewed. Instead, Petitioners ambiguously sought "clarification * * * that the case is remanded for a new trial", but "at the district court's discretion * * * *" (App. G at 43a), which they argued was "not required" (App. G at 56a). The Federal Circuit declined the request (App. B at 14a-15a).

Petitioners then moved the trial court for new trial but did not rely upon, mention or follow F.R.Civ.P. Rule 59; the trial court properly denied the motion (App. C at 16a-18a), observing that:

> "Plaintiffs [Petitioners] failed to preserve their appellate record on the evidentiary issues they now seek to raise * * *." (App. C at 17a)

On a second appeal the Federal Circuit found that the "district court properly concluded that * * * it had no discretion to grant a new trial." (App. A at 2a-3a; see, Id at 9a-13a)

Having failed timely to assert the contentions which they now seek to assert here, Petitioners waived those contentions and may not seek that relief here.

PETITIONERS INVITED "JMOL ANALYSIS"

Petitioners' second question presented about "utiliz[ing] JMOL determination in a non-JMOL context", whatever that means, is seriously undercut by Petitioners' motion below for new trial, which is tacitly the subject of this Petition but was not included in Petitioner's appendix.

Following F.R.Civ.P. Rule 7, Petitioners' motion for new trial was specifically based first on F.R.Civ.P. Rule 50 which governs judgments as a matter of law after a jury verdict, and no other Federal Rule. Although Petitioners' motion also referred to a trial court's alleged "inherent power to order a new trial upon remand" and "a review of the Appellate Court's DECISION", the motion did not anywhere even mention F.R.Civ.P. Rule 59 which governs new trials generally.

By moving for new trial pursuant to F.R.Civ.P. Rule 50 Petitioners invited "JMOL analysis" from the courts below and Petitioners may not now complain that such analysis was followed.

MATERIAL MISREPRESENTATIONS APPEAR IN THE PETITION

Respondent disagrees with representations of fact made on the indicated pages of the Petition for the following reasons:

Pet. pp. 3-4: Petitioners did not proffer or produce "checks, sales registers, payments by DHI" underlying the summary charts which are discussed at Petition, pages 3-4 (App. N at 134a-141a, 161a-165a, 168a, 170a, 175a-178a) and which Petitioners displayed to the jury during closing argument. Indeed, for that reason the trial court originally deferred ruling on admissibility of Exhibits 15001 and 15002. (App. N at 207a, 211a) The trial record did not establish that plaintiffs [petitioners] ever provided to any

defendant the underlying documents to support these charts. (App. E at pp. 35a-36a)

Pet. pp. 8-9 Petitioners purport to state what the Federal Circuit "found" with respect to the award of fraud damages but omit from their description the following grounds stated by the Federal Circuit:

> (i) Petitioners' failure to satisfy California's requirement that damages be proved "with reasonable certainty" (App. E at 33a),
>
> (ii) The unavailability under California law of the "benefit of the bargain damages" awarded here (App. E at 33a), and
>
> (iii) "This evidence fails to establish the *profits*, if any, that DH derived from sales of the human products prior to entering into the distribution agreements" (App. E at 33a-34a).

In the Petition the foregoing items are redacted (without noting the redaction) from the paragraph of the Federal Circuit Opinion from which Petitioners extract what they assert to be the Federal Circuit's findings respecting fraud damages.

Pet. p. 15 Purporting to state the trial court's reasons for not exercising its discretion to consider Petitioners' motion for new trial, Petitioners quote from argument colloquy instead of the actual trial court opinion which discloses that the trial court predicated its decision in part on the following:

> "Plaintiffs [Petitioners] failed to preserve their appellate record on the evidentiary

> issues they now seek to raise, and it is not proper for this Court to review the orders entered in this case by the prior judge. * * * Finally, the failure of Plaintiffs to raise the evidentiary issues they now raise, after having had ample opportunity to do so, militates against discretion being exercised in their favor." (App. C at 17a-18a)

CONCLUSION

Petitioners failed timely to perfect their record below, invited the error now claimed and now misstate facts which are critical to their arguments for certiorari. Additionally, the absence of a compelling reason to grant certiorari is patent and stated in the two opinions of the Federal Circuit. That being the case, it is respectfully submitted that this Court should decline to consider the Petition.

Respectfully submitted,

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73

AMER. RECORDS AND BRIEFS

(3)

No. 07-34

FILED
SEP 18 2007
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SUPREME COURT, U.S.

In the Supreme Court of the United States

DESIGNING HEALTH, INC.,
Petitioner,

v.

UDO ERASMUS, FLORA, INC., FLORA MANUFACTURING AND DISTRIBUTING, LTD., and THOMAS GREITHER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF

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September 18, 2007

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INTRODUCTION - SUMMARY OF OPPOSITION AND SUMMARY OF REPLY

THE OPPOSITION

Petitioner DHI asserted the Court of Appeals of the Federal Circuit did not fulfill its Seventh Amendment constitutional responsibilities in finding that after it reversed a denial of a JMOL as to damages, the Circuit is not required to (1) consider and (2) instruct the District Court as to which of the three Weisgram directions (Weisgram v. Marley Company, 528 U.S. 440 (2000)), the District Court should follow (App. A at 1a).

The Opposition, (Page 2) asserts:

"...the Federal Circuit fully analyzed the evidence of damages, reversed the damages awards, reversed the trial court's denial of JMOL (the opposition does not indicate only as to damages) and issued no instructions (App. E at 23a-24a, 34a, 36a, 37a), thereby giving notice that the trial court lacked authority to act further respecting evidence of damages..." (citing to) *Tronzo v. Biomet Inc.*, 236 F.3d 1342, 1348 (Fed. Cir. 2001); *Engle Industries, Inc. v. Lockformer Co.*, 166 F.3d 1379, 1382 (Fed. Cir. 1999).

Respondent's Opposition (page 2), then asserts:

"...Having failed timely to assert the contentions which they now seek to assert here, Petitioners waived those contentions and may not seek that relief here."

SUMMARY OF REPLY

Respondent misunderstands the Seventh Amendment constitutional issues which DHI presents. The Seventh Amendment constitutional error of the Federal Circuit in its February 26, 2007 Decision, (App. A), was its finding that the Federal Circuit's prior decision had fulfilled its constitutional obligations, though the prior Federal Circuit decision had not (1) considered and/or (2) directed one of the three Neely v. Martin K. Eby Construction Co., 386 US 317 (1967) alternatives.

The February 26, 2007 decision (App. A) assumed (contrary to Seventh Amendment jurisprudence), that its June 1, 2005 initial limited Federal Circuit decision (App. B at 37a), which upheld the District Court's denial of Respondent's motion for JMOL as to liability and reversed aspects of the District Court's denial of Respondent's JMOL motion as to damages, without further consideration and directions, was constitutionally sufficient.

The Supreme Court in Martin K. Eby, supra and Weisgram v. Marley Company, 528 U.S. 440 (2000) found that the Seventh Amended was not violated in that the Court of Appeals upon reversal of a denial of a JMOL as to liability had the jurisdictional authority to direct entry of judgment for the verdict loser.[1]

---

[1] The Federal Procedure is contrary to California State law. California Code of Civil Procedure Section 629, which requires, in the very rare reversal of denial of a JNOV as to liability, that judgment be entered below for the verdict loser.

Petitioner DHI contends that an appellate court's reversal of a *JMOL* is but the first step of the Circuit Court's required constitutional analysis as identified in Neely, supra and Weisgram, supra to afford Seventh Amendment protection, (particularly as presented here with a Federal Circuit splitting its first decision in upholding liability (or affirming the denial of the trial court's post trial *JMOL* as to liability), and reversing the post-trial denial of JMOL as to damages).

Petitioner DHI asserts that upon reversing a denial of a JMOL (even as to liability), Seventh Amendment safeguards require the Federal Circuit to then explicitly undertake two (2) further steps: (1) that of considering which one of three alternatives as enunciated in Neely, supra and Weisgram, supra are appropriate: (1) directing entry of judgment below; (2) directing a new trial; or (3) directing that the district court "with the feel for the case" determine if a new trial is appropriate; and (2) that of then directing the District Court as to which of the three alternatives the Federal Circuit has selected.

Contrary to Respondent's arguments (Oppo. at 2), the Federal Circuit's June 1, 2005 DHI I decision (App. F) does not reflect (1) any consideration by the Federal Circuit as to the second step as to which of the three Weisgram alternatives are appropriate, and (2) does not provide a direction to the District Court below as to which of the three Weisgram alternatives the Federal Circuit has selected.

Even upon Petitioners' June 27, 2007 Petition for Rehearing (App. G at 41a) requesting that the Federal Circuit undertake its constitutional responsibility to consider and to choose one of the three Weisgram, supra alternatives, in response, the Federal Circuit was silent (App. I at 79a).

Respondent (Oppo. at 2) is incorrect in urging support of the Federal Circuit's DHI II decision (App. A at 10a) which reasoned that its prior DHI I decision (App. E at 21a) had fulfilled its constitutional responsibilities and implicitly foreclosed further consideration in DHI II.

The Federal Circuit in DHI II found that the Federal Circuit in DHI I was not constitutionally required to take steps 2 and 3, that of "considering" and "choosing" one of the three Weisgram alternatives. The Federal Circuit in DHI II (App. A) erroneously found that the Federal Circuit in DHI I had fulfilled its constitutional responsibility, when in fact it had not.

The Federal Circuit's, in DHI II (App. A at 10a), generalized references to authorities (cited in the Opposition at 2) which hold that matters implicitly determined in a Circuit Court's first opinion are deemed resolved, is inconsistent with finding the Federal Circuit fulfilled its Seventh Amendment obligations in the first instance (App. E) in that DHI I failed to (1) "consider" and (2) "direct" the District Court or instruct the District Court as to one of three Weisgram alternatives.

After the Federal Circuit's failure in DHI I (App. E at 21a) to consider and instruct, the District Court, then confronted with a partial reversal of a JMOL as to damages only, without direction, contingently commits error (App. C at 17a) by finding that, "...Even if this District Court had discretion ... it would be exercised in favor of defendants..." (App. C at 17a), in that the initial trial judge had retired, and the judge to whom the case was now assigned was in no better position than the appellate court to render a new trial determination (App. C at 17a).

Error by the Federal Circuit in DHI I, is compounded by the District Court's subsequent error.. The District Court in its decision (App. C at 17a) creates two classes of jury verdict winners upon a reversal of a JMOL as to liability, one whose trial judge was available after reversal to consider a new trial and a second class of jury verdict winners whose trial judge is no longer available.

The error by the Federal Circuit in DHI II was to find that the prior Federal Circuit decision in DHI I had fulfilled its Seventh Amendment responsibilities when the Federal Circuit in DHI I had not in fact "considered" and/or "directed," Weisgram, supra.

CONCLUSION

Petitioner DHI first asserts constitutional error by the Federal Circuit in DHI II (App. A at 1a) in finding that the Federal Circuit had previously fulfilled its Seventh Amendment obligations in DHI I (App. E at 21a), though it did not (1) "consider" and/or (2) "direct," any of the three (3) Weisgram alternatives.

DHI then asserts that the District Court (App. C at 17a) contingently abridged DHI's Seventh Amendment rights by indicating it would not consider a new trial even if it had discretion to do so in that it was not the judge that tried the case in the first instance.

DHI further asserts however, that its Seventh Amendment rights were abridged in the Federal Circuit's DHI II (App. A at 1a) finding not only that it had previously fulfilled its obligations in DHI I when no consideration or direction was provided, but DHI further asserts that its reliance upon the Federal Circuit's "invention" of the split denial of JMOL as

to liability, reversing a denial of JMOL as to damages..." only (App. A at 1a) (particularly given the facts and circumstances presented), requires entry of judgment below was inconsistent with the Seventh Amendment and should be reversed.

The Opposition asserts that the Petitioner "made misrepresentations" (Oppo. at 3) which is not only without basis, but is not helpful to the consideration of the issues presented.

Respectfully submitted,
LAW OFFICES OF ALLEN HYMAN

By:
Allen Hyman, Esq.
Attorneys for Petitioners
DESIGNING HEALTH, INC., ROBERT MACINTOSH COLLETT and BERNARD COLLETT

DATED: September 18, 2007